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THE *RATIO DECIDENDI* OF A CASE

DR. GOODHART objects to the main thread of my argument because there may be a divergence between the rule of law enunciated by a judge as governing his decision, and a rule which is constructed by ascertaining the facts which the judge considered to be material and the conclusion based upon them.[1] He gives an example of this taken from the speech of Lord Atkin in *Donoghue* v. *Stevenson*,[2] where that learned Lord of Appeal, besides enunciating a wide principle (the " neighbour principle "), also enunciated a narrower principle about the relationship between a manufacturer and a consumer of products. Clearly these two rules or principles are not the same; the neighbour principle includes the manufacturer principle, but the contrary is not true. Dr. Goodhart claims that this example helps to confirm his opinion, and his argument takes the ingenious form of saying that Lord Atkin's broad statement— " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour " —is the rule of law enunciated by the judge, upon which the classical theory concentrates, whilst the narrow statement— " . . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer etc." —is the statement of the material facts and conclusion upon which his theory would concentrate. Clearly the two *rationes decidendi* are not the same.

With this argument I should respectfully disagree. Both the broad and the narrow propositions which Lord Atkin made can be described as " statements of material facts plus conclusions " or as " rules of law enunciated by the judge," for the descriptions are purely alternative; the question is begged by characterising the wide one as " the rule enunciated . . . " and the narrow one as " the

1 A. L. Goodhart, " The *Ratio Decidendi* of a Case " (1959) 22 M.L.R. 117, at 120 and 122. In this reply I have limited the discussion to points of substance.
2 [1932] A.C. 562. Lord Atkin's speech begins at p. 578; he states the broad principle at p. 580 and the narrow one at p. 578.

statement of material facts . . . " Clearly it is very important to decide which is the *ratio*, but this decision is in no way assisted by any supposed distinction between rules on the one hand and statements of material facts plus conclusions on the other, for the latter is only a description of the former. Thus if one cares to talk the language of *rules* the problem posed by Lord Atkin's speech is this —which rule did Lord Atkin conceive to be the rule applicable to the case ? If one cares to talk in terms of statements of material facts and conclusions then the problem becomes this—are the material facts (accepting Lord Atkin's own determination of them) to be found in the narrow proposition or the wide one ? However described the problem is the same.

Dr. Goodhart further objects [3] that his theory alone makes it possible to discover the *ratio* of a case when there is no opinion given. Indeed one of his reasons for rejecting the classical theory lay in its apparent hopelessness in such a situation. He says:

> " . . . every case must contain an ascertainable principle of law, even though there may be no opinion delivered by the judge." [4]

This is a dogmatic assumption, and I am not aware of any authority for such a dogma. It would be an odd assumption to make. To say that in any case where no opinion is given the judge *must* have acted as he did because of some rule of law is no doubt a comforting assumption, and I am not quite clear how it could be established by evidence, and what sort of evidence would be relevant. To go further and say that this rule *must* be ascertainable in all such cases is very questionable. No doubt it is possible to try to ascertain it, just as it is possible and sensible to do one's best to discover the age of a giant tortoise in the zoo, but without making any assumption that truth *must* emerge from such an inquiry. For when a judge delivers no opinion, and thus states no principle or rule of law, it may be problematic what rule or principle, if any, he had in mind. There is precisely the same difficulty involved in any attempt to discover which of the facts of the case he thought were material; the source of the difficulty is the same. The judge has not told us. In studying such cases the lawyer is in much the same position as he is when he is called upon to write an opinion. He shares with the bench a body of legal knowledge, and he tries to put himself in the position of a judge; in doing so he relies upon a mass of assumptions. To borrow an analogy from a distinguished writer,[5] he is in a position similar to that of a person watching a cricket match; the umpire gives Smith out by enigmatically raising his finger, but the spectator who knows the

[3] (1959) 22 M.L.R. 121.
[4] (1959) 22 M.L.R. 121. See also *Essays in Jurisprudence and the Common Law*, p. 6.
[5] H. L. A. Hart, " Definition and Theory in Jurisprudence " (1954) 70 L.Q.R. 37 at p. 42.

rules can make a sensible guess as to the reason. He may be wrong—the umpire may in fact have given his decision for some improper reason (a bribe), or for a different reason from that which occurs to the spectator, but the spectator is usually right. Law is just more complicated than cricket. I cannot myself see that Dr. Goodhart's suggested rules for dealing with the opinionless case would assist greatly.[6] Suppose a case where the defendant was an ambassador—would facts of person be irrelevant? Suppose a case where an occupier was being sued—would it not be relevant that the accident happened before the Occupiers' Liability Act came into force? Would time and place be irrelevant? Suppose a case where a seller delivered goods which the buyer said did not correspond to a sample. Would facts of kind be irrelevant? Suppose a case where a person had been prosecuted for breach of the rules governing the storage of petrol—would facts of amount be irrelevant? Surely in such situations as these (and they could be multiplied easily enough) the lawyer who is reading a case which has no opinion would be wise to use his common sense and legal knowledge in making his informed guess as to the *ratio* of the case. Furthermore the lawyer has, perforce, to adopt much the same attitude to many cases where there are opinions. The English judgment is an argumentative and sometimes rambling affair; it is not always as clear as it might be. In no small degree the vitality of the common law is the consequence of the tradition that judges argue from the bench.

Dr. Goodhart is led to reject the classical view in part because "the statement of law [made by the judge] may be too wide or too narrow."[7] Why quite the judge's decision as to what facts should be treated as material should be faithfully accepted whilst his decision as to what principle of law should govern the decision should not it is a little difficult to see; such a distinction would seem to rest on a misconception of precisely the same kind as that involved in Dr. Goodhart's analysis of Lord Atkin's famous speech. Dr. Goodhart bases his argument here on the practice of the courts,[8] and this is perhaps the time to raise a heretical doubt. It is no doubt true that superior courts exercise a power of correcting statements of law made by judges in lower courts; they hold that a proposition

[6] They are set out at pp. 25–26 of *Essays in Jurisprudence and the Common Law*. The basis for Dr. Goodhart's rules is that, in general, facts of person etc. are irrelevant in the common law, and so no doubt they are. But then there are a large number of facts which are generally irrelevant—motive for example. Even however if his list of facts to be discarded was very much more complete than it is, it would still be inadequate, for the exclusion of these facts would do no more than give effect to a number of generalisations about the common law, and just as an opinion by counsel which was based only on generalisations about the law would be likely to be wrong, so would a guess as to the *ratio* of a case be likely to be wrong if based only on generalisations. The best possible guess cannot be made without knowing all the rules.

[7] (1959) 22 M.L.R. 121.

[8] See *Essays in Jurisprudence and the Common Law*, pp. 6–8, where a number of examples are given of corrections, none of them by courts bound by the decision in which the too wide or too narrow statement of law is made.

of law was not quite accurately stated, being too wide or too narrow. But superior courts are not bound by decisions of lower courts. I am not persuaded that courts exercise any power of correcting statements of law drawn from binding decisions. Certainly Dr. Goodhart cites no examples of this happening. Indeed the textbook writers seem to preserve a curious conspiracy of silence—they accept Dr. Goodhart's point, but again do not produce authority for it.[9] The one exception is to be found in Salmond on *Jurisprudence*,[10] where it is said:

> "Yet instances are not unknown of puisne judges of the High Court cutting down the decisions of the House of Lords."

The instance cited is *Att.-Gen.* v. *Valle-Jones*.[11] The case in question hardly supports the proposition for which it is cited. An action was brought on behalf of the Crown to recover damages for the Crown's loss of the services of two members of the Air Force, who had been injured by the negligent driving of the defendant's servant. The damages claimed consisted in the wages paid to the injured men, and their hospital expenses. It was objected that the Crown was not legally bound to pay the wages or the hospital expenses of the two men, and that these payments were voluntary and so irrecoverable. In support of this contention passages from the speeches of Lord Parker and Lord Sumner in *Admiralty Commissioners* v. *Owners of Steamship Amerika*[12] were cited. Lord Parker had said:

> "No person aggrieved by an injury is, by common law, entitled to increase his claim for damage by any voluntary act."[13]

Mackinnon J. comments:

> "That proposition is of course perfectly sound."[14]

and goes on to interpret these words in a somewhat odd way. Nowhere does he say that Lord Parker had been inaccurate. In relation to the passages cited from Lord Sumner's speech, he says:

> "Some sentences from the opinion of Lord Sumner have been cited on behalf of the defendant, and if regard be had merely to their terms they might be relied upon in support of his contention in this case. I think, however, that it is sufficient for the purpose of showing that these sentences ought not to be applied to such a case as the present, to bear in mind that in

[9] See Paton, *Jurisprudence*, 2nd ed., 160; Keeton, *The Elementary Principles of Jurisprudence*, 2nd ed., p. 106; Dias and Hughes, *Jurisprudence*, pp. 73, 87.

[10] 11th ed., p. 224. In the context in which this occurs the process of correcting earlier statements of law is treated as the same thing as "distinguishing" earlier cases. *Sed Quaere.*

[11] [1935] 2 K.B. 209.

[12] [1917] A.C. 38.

[13] [1917] A.C. at p. 42.

[14] [1935] 2 K.B. at p. 219.

> the opening of his speech Lord Sumner said, 'It is clear that the action was not brought for the loss to a master of the services of his employee.'" [15]

The learned judge then goes on to point out that the case before him does involve such a claim, and is distinguishable. He does not correct Lord Sumner, but he does insist that Lord Sumner's remarks be read in their context, as they were delivered. The frequent insistence by judges that passages cited to them from reported cases should be taken in their context is no more than an insistence that sensible steps should be taken to discover what the members of the higher court meant; it does not involve a claim to any power to correct the statements of law made in the higher court. A lower court's refusal to follow a binding decision may be justified on a number of grounds, and sometimes the grounds adopted, though they may have convinced the court, convince nobody else. What precisely these grounds are is a difficult question, and on some of them there would not be a great body of settled practice. I should suggest that it is fairly clear that refusal to follow a binding authority cannot, on the current practice, be justified by any argument which involves saying that a higher court stated the law inaccurately.[16]

Finally may I guard myself against the suggestion that, in criticising Dr. Goodhart's theory I have committed myself to the view that the classical theory gives a complete explanation of the difficulties surrounding the conception of the *ratio decidendi* of a case. I am merely concerned to defend the simple thesis I put forward in my note, which was that there was a flaw in Dr. Goodhart's argument on this subject.

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[15] [1917] A.C. at p. 50.
[16] Except under the doctrine governing decisions given *per incuriam*.
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A HOMESTEAD ACT FOR ENGLAND?*

PROBLEMS of family disorganisation have probably received more academic attention in recent years than any other legally regulated field of social interaction. Moreover, with the fearful impact of the 1939–45, the Korean and the Middle-Eastern wars on the one hand and the insecure economic conditions to which they have given rise on the other, the emphasis has not been confined merely to *personal* family relationships but has also concentrated on questions of *provision* for members of the shattered families. Matrimonial (or family) property law—as distinguished from any other kind of property law—is now recognised. The modern developments of deserted wives' rights, occupational and proprietary rights in the family home, beneficial and legal ownership disputes, now prickle out from the law reports with porcupine-like profusion and call for a wholesale re-appraisal of the value of existing legal dogma and its function in changed social surroundings. A Royal Commission has laboriously compiled a Report on many of the problems involved, centenary studies of family developments since the Divorce Act of 1857 have appeared [1] and a distinguished group of internationally flavoured jurists has turned out the most complete and illuminating study yet made of matrimonial property law.[2] Everything has dictated the need—the vital need—for a thorough analysis of family problems by an adequately qualified body able to recommend, and to produce the evidence with which to inspire, legislative action.

The Report of the Morton Commission on Marriage and Divorce,[3] however, both generally [4] and with respect to matrimonial property law in particular,[5] demonstrates the shattering of fond hopes. With but one or two exceptions, its recommendations show a distressing failure to interweave the strands of the sociological data with the legal material which it nominally considered. The failure of the Commission to make generally acceptable proposals and the absence of any extensive legislation forthcoming

* The writer wishes to express his thanks to Professor Otto Kahn-Freund of the London School of Economics and Professor Fowler V. Harper of Yale Law School for their valuable comments in the preparation of this article.

1 Esp. *A Century of Family Law*, ed. Graveson and Crane (1957); McGregor, *Divorce in England* (1957).

2 *Matrimonial Property Law*, ed. Friedmann (1955). The volume is the second in the University of Toronto's Comparative Law Series and will be referred to in this article as the "Toronto study." For a broader but less critical study, see *Le Régime Matrimonial Légal dans les Législations Contemporaines*, ed. Rouast (1957).

3 Cmd. 9678, 1956.

4 For some penetrating criticisms of the Commission and its work, see McGregor, above, n. 1, esp. chaps. 5–7.

5 See Kahn-Freund, (1959) 22 M.L.R. 241.

from Parliament has provoked the writer to attempt in the present study an alternative approach to the treatment of some of the problems hinging on the occupation of the matrimonial home which he feels will mirror reality rather better than that of the Commission.

A preliminary word of qualification, however. The modern tendency in many different cultures is increasingly towards recognising the *joint* nature of the enterprise of marriage.[6] The future will no doubt bring to England too a broader recognition of "matrimonial joint stock"[7] as the entity with which the law should concern itself[8] yet since statutory amendments already introduced have proved to be anything but broad and sweeping,[9] the present suggestions do no more than add an extremely vital part of the patchwork of legislation.

Every modern study shows only too clearly that in relation to this "most important tangible substratum of the household community . . . the rule of separation of property is for very good reasons being emasculated."[10] The increasing use of the joint tenancy by married couples,[11] the frequent merger of their assets in buying and furnishing their home, the need to provide for the spouses in the event of the collapse of the marriage and the difficulties of fair division of the beneficial ownership[12]—all these factors indicate the need for some device to safeguard the proprietary and occupational

6 See in particular the Toronto study and the recent article by Kahn-Freund (*supra*, n. 5).

7 Lord Evershed M.R. in *Silver* v. *Silver* [1958] 1 All E.R. at 525.

8 Though community property in any shape or form only received minority support within the Commission: Report ss. 652–653. Of seven dissenters (six of whom, significantly enough, were married women) three would have recognised community limited to the matrimonial home and its contents and three supported it as a general proposition based on the Scandinavian model (*cf.* Malström, *Matrimonial Property Law in Sweden*, pp. 410 *et seq.* of the Toronto study).

9 The legislation implementing the Report of the Morton Commission is very bulky yet, at the same time, very incomplete: see Maintenance Agreements Act, 1957 (5 & 6 Eliz. 2, c. 35); Matrimonial Causes (Property and Maintenance) Act, 1958 (6 & 7 Eliz. 2, c. 35); Maintenance Orders Act, 1958 (6 & 7 Eliz. 2, c. 39); Matrimonial Proceedings (Children) Act, 1958 (6 & 7 Eliz. 2, c. 40); Divorce (Insanity and Desertion) Act, 1958 (6 & 7 Eliz. 2, c. 54); Matrimonial Causes (Decree Absolute) General Order, 1957; Matrimonial Causes Rules, 1957 (No. 619); Matrimonial Causes (Amendment) (No. 2) Rules, 1957 (No. 1177); Matrimonial Causes (Maintenance Agreements) Rules, 1957 (No. 2202).

10 Kahn-Freund, *Matrimonial Property Law in England*, p. 267, at p. 301, of the Toronto study.

11 For interesting use of the joint tenancy as a means of home protection, see the New Zealand Joint Family Homes Act, 1950, as amended. This statute, similar in its operation to the homestead laws considered below, contemplates the settlement of the family home on the husband and wife as joint tenants (with all the rights and duties of joint tenants) and subsequent exemption from the claims of creditors and gift, death and stamp duties. In that the system merely sets up *optional* machinery, however, and does not *compel* a family to obtain the security it offers, it provides no greater safeguards against voluntary alienation by one of the spouses than does the present English scheme.

12 The main difficulty being how far to compensate one not having the legal title in the home for loss of its use: *cf.* the present writer's note in (1958) 21 M.L.R. 419.

rights of the spouses in the home. The situation calls for a principle to be automatically applied on marriage (or on the purchase of property for use during the marriage) and *out of which* the husband and wife can contract if they wish, rather than one *into which they are at liberty* to draw their possessions if the idea occurs to them.[13] To the present writer's mind, a " homestead " Act supplies the most likely answer.[14]

The Royal Commission and the Matrimonial Home

The details of the Report of the Commission in so far as they deal with the matrimonial home have already been dealt with in these pages.[15] For the purposes of the present article, therefore, there is no need to say more than this: the present writer would question the Commission's approach to the whole problem of the deserted wife as exemplified in sections 665–666 of the Report in particular.

It is tolerably clear to all but the Victorian that the modern notion of marriage does not imply that a wife only has the right to stay in her family's home *when she is left there by her husband.*[16] She does not live there by his leave and licence if he is the legal owner, having to leave on his merest whim. She lives there as a person who is an essential part of a joint venture entitled to stay as long as her husband stays,[17] to use his credit to support herself or to use appropriate court procedures to obtain maintenance should he refuse to keep her. Even when the marriage ends in divorce or death, she will have a prima facie right to claim maintenance from her husband or his estate and, lest any due expectations or rights be defeated, recent legislation [18] gives the court power to provide for a *former* wife who has not remarried, out of her deceased ex-husband's estate. Everything points towards a general recognition of the mutual support obligations arising *from the marriage* and emphasises that when the need is greatest, the courts will not be able to withhold maintenance merely from lack of machinery to grant it.

To fit in with this background, therefore, or even from the straightforward point of view of the social undesirability of turning a wife and family out into the street and perhaps putting them on

[13] The Morton Commission (Report, s. 651) preferred the second approach and thought the present inter-relationship between separate and joint property-holding was satisfactory.

[14] For comparable suggestions, see Mitchell, " Learner's Licence " (1954) 17 M.L.R. 211, 218; Friedmann, p. 441, n. 7 of the Toronto study; Crane, " The Matrimonial Home: Proposals of the Royal Commission on Marriage and Divorce " (1957) 21 Conv.(N.S.) 125, 127–128.

[15] *Supra*, n. 5.

[16] Suggested in the Report, s. 669. See also *per* Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, 477; [1952] 1 All E.R. 1307, 1311; *Lloyds Bank, Ltd.* v. *Oliver's Trustee* [1953] 2 All E.R. 1443; *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274; [1954] 1 All E.R. 449.

[17] *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792.

[18] Matrimonial Causes (Property and Maintenance) Act, 1958, s. 3.

National Assistance, the right to claim shelter from the husband is a necessary incident of our so-called Christian marriage. Naturally, when a wife is deserted—when her husband has left her, perhaps refuses to make her any allowance and then sells her home over her head without providing her with anywhere else to live—the rights which she has casually taken for granted while living with her husband, assume tremendous importance. And in the comparable situation where it is an old and needy husband who is the butt of his property-owning wife's cruel conduct, is it necessary to convert desertion into destitution by turning him out of the shelter which has been his home for many years? [19]

The two features of the "homestead" concept which are most valuable in this context are (1) the frequent requirement that property be registered as homestead before either spouse can claim any of the benefits attaching to it, thereby giving constructive notice to a would-be purchaser of the nature of the use of the property [20] and (2), the principal benefit to the non-owning spouse, that of requiring the joinder of husband and wife in all dispositions. From the time the couple acquire a common home until their marriage ends in death or divorce,[21] neither of them has the right to sell or encumber it without the formal consent of the other and a disposition not complying with this requirement will be void. The writer will now examine the development of the system in the United States—its homeland—discuss its advantages and difficulties and recommend the most suitable ways for integrating it into the English family law scheme.

The Development of the "Homestead" Device in the United States

Most of the individual jurisdictions in North America, including four of the common law provinces of Canada, have made provision for the setting aside of a family home—judicially described as "the house and land where the family dwells." [22] Three main consequences may then attach. First, nearly every state or province [23]

[19] The "improvements" in the deserted wife's position suggested in ss. 670–673 of the Report commit the cardinal blunder of putting the burden of protective action on the wife herself (a suggestion of Kiralfy (1956) 19 M.L.R. 216). Obviously, in every case there will be some delay (*e.g.*, see the *Lee* cases: 6 weeks before maintenance application; 3 years before application under s. 17; *Street* v. *Denham*: 6 months before maintenance application; *Barclays Bank, Ltd.* v. *Bird*: 1 month before maintenance application, 4 months before application under s. 17)—and an unscrupulous husband will easily be able to take advantage of it to get rid of the house. This same objection defeats any use which might be made of s. 2 of the new Matrimonial Causes (Property and Maintenance) Act, 1958. As this section excludes bona fide purchases from its provisions, however, it adds nothing to the existing state of affairs.

[20] See below, pp. 465–467.

[21] See below, pp. 470–473.

[22] *Berggren* v. *Bliss*, 122 Neb. 801 (1932).

[23] Only three jurisdictions in the U.S.—Rhode Island, Delaware and the District of Columbia—give no exemption.

exempts a homestead from execution up to a fixed amount, the actual figure varying from state to state[24]; secondly, the formal joinder in dispositions which we have just outlined, and lastly, the provision of a home for a surviving spouse and family on the death of the owner.

The origins and development of these three separate ideas show very clearly the disunity prevailing within the modern concept. The first exemption from execution granted to a man's home was in a statute of the then independent Republic of Texas in 1839. It had an interesting background. The flood of immigrants into the Republic was composed largely of debtors fleeing from the United States to escape their creditors and, with such a community, it was clear that some stabilising protection had to be given. A law of 1829 exempted newly acquired land for twelve years from being taken in execution for debts incurred *prior* to the change of domicile, and provided that repayment was to be made after that date only if it did not interfere with the debtor's trade and the maintenance of his family. On January 26, 1839, the legislature of the Republic passed the first actual homestead exemption law, and when Texas became part of the United States in 1845, its first Constitution guaranteed the exemption.[25] Rapidly—nine states in the next ten years—others repeated the experiment, trying to bolster their sagging economic structures but this time by affording a debtor some protection against his creditors *within* the state. The philosophy of the idea apparently was that an economy containing a debtor living and working and a creditor partly unpaid was more satisfactory than one harbouring the destitute beggar and the complacent banker. Significantly enough, though, there is no consideration in the statutes either of protecting the debtor's *family* directly against creditors, *e.g.*, by allowing them to make the homestead claim, or of protecting the wife and children against the wilful wrongdoings of the husband and father, as where he sells the home and deserts. Indeed, almost half the way-showing statutes of the 1840s included no provision requiring the consent of the

[24] The exemption is granted in parts of Canada and has long been available (since a law of July 12, 1909) in France. The modern increase of the exemption allowed to a "*bien de famille*" to five million francs (by a law of March 12, 1953) removes one of the chief obstacles to its popularity. In Switzerland, on the other hand, where the exemption of the "*heimstätte*" has been provided for just as long (see Swiss Civil Code, 1907, Arts. 349–359, Art. 349 enabling the cantons to enact laws granting the exemption), a homestead's size need only be limited by the reasonableness of the support or the adequacy of the shelter it affords a family ("*. . . ihren ordentlichen Unterhalt zu gewähren oder ihr als Wohlnung zu dienen*": *Art.* 350). The Swiss have still been unwilling to make use of the provision, however, perhaps because of the overcomplication of the procedure necessary for obtaining permission to dispose of the property.

[25] Texas Constitution, 1845, Art. VII, s. 22.

spouse of an owner [26] and several of the modern systems *do not even presume a family* when granting the exemption.[27]

The self-same conditions that gave rise to the need for this exemption—the vagaries of frontier life and the uncertainties of the economic system—had another vital effect on family life, however, and so far as the homestead system in particular is concerned, it planted the seeds of the developed concept we know today. They were the causes of the emergence of the married woman from beneath her shroud of common law inferiority. The pioneer-wife, for one thing, was the complete marriage-*partner*, sharing all her husband's duties and responsibilities [28] and to this day the egalitarian structure of the pioneer family lingers throughout the West and Mid-West.[29] In the East, too, gradual industrialisation gave a woman the opportunity of achieving sufficient economic independence to loosen her rigid family bonds and put herself on equal bargaining terms with her prospective husband.[30] Add to this the tremendous family burdens thrust on to womenfolk in the holocaust of the Civil War and the uncanny identification of "women's rights" with "civil rights" in the mid-century democratic programmes [31] and the modern "suburban matriarchy" [32] was well on its way to being established.

With this increase in her status, the American married woman became a candidate for protective consideration much earlier than her English cousin.[33] In relation to the home in particular, states began to recognise that the possible injustices caused by male dominance both in establishing and in controlling the household were hardly in accord with the female's growing emancipation. The result was that the homestead device, originally having a quite different purpose, was adapted to serve the end of protecting a wife (and, through her, her family) against her husband. Some states had already made her consent necessary to the sale or encumbrance of the

[26] See the Texas Law of 1839; Miss. Laws, 1841, c. 15; Cal.Constit., 1849, Art. XI, s. 15; N.Y.Laws, 1850, c. 260.

[27] See, *e.g.*, Me.Stats.Rev., 1954, c. 112, s. 68; Minn.Stats.Ann., 1946, s. 510; N.Y.Civ.Prac. Act, s. 671; Ore.Rev.Stats., 1953, s. 23.240; Vt.Stats.Rev., 1947, s. 2610; Wis.Stats.Rev., 1955, s. 272.20.

[28] "Pioneer" is, of course, no exaggerated use of language. It was not until almost the end of the nineteenth century that the frontier gap was finally closed (fully ten Western or near-Western states were admitted to the Union after 1889 and before 1959, the last being Arizona and New Mexico in 1912).

[29] See Hayner, "Regional Family Patterns: The Western Family," 53 Am.Jo.Soc. 432 (1948); Calhoun, *Social History of the American Family*, Vol. II, chaps. 5–8 (1918).

[30] See Calhoun, *supra*, n. 29, chap. 9.

[31] See "The Family and Cultural Change," Stern, 4 Am.Soc.Rev. 199, 202 (1939).

[32] Sirjamaki, *The American Family in the Twentieth Century*, 145 (1953).

[33] Whereas full-scale reform only began in England in 1882, in the United States nearly every state passed some statute removing most of the married woman's disabilities between 1844 and 1850 (see Peck, *The Law of Persons and Domestic Relations*, 3rd ed., 333–341 (1930); Vernier, *American Family Laws*, Vol. III, 167, 171–185 (1935); Calhoun, above, II, chap. 5). It was not until 1921, however, that a Wisconsin statute, the first to give complete legal equality between the sexes, came into operation (see Wis. Laws, 1921, c. 529; now Wis.Stats.Rev., 1957 s. 6.015).

homestead and now, as each enacting or amending state followed this lead—in most cases adding some peculiar kind of post-mortuary protection too—the theoretical protection became complete.[34]

It is this multiplicity of purpose which is one of the main weaknesses of the system in the United States and which has contributed to its disuse in most urbanised parts of the country. Clearly, the ideas of protecting someone against his *creditors* and of protecting him against his *family* (or of protecting his family against *him*) have really very little in common and nothing would be lost by keeping them separate.[35] Indeed, this has been done by a few states[36] and by those provinces of Canada which operate homestead systems.[37] If the separation is not maintained, the experience of the United States points up the possibility of disastrous consequences. For example, little attempt has been made to modernise the size of the exemptions allowed,[38] with the result that they are by no stretch of the imagination adequate to protect a house as valued by modern standards. If the creditor should levy execution against it, he will simply have to sell it and pay the debtor the cash value of the exemption out of the proceeds. This is rather different

[34] The joinder requirement is not confined to the disposition of homestead property, though this is our concern here. Since almost every state still keeps dower in some form or other—quite often extending it to interests in personalty as well as realty—the wife's joinder will be necessary to release her dower interest (see Vernier, *supra*, III, 351–371). The result is a remarkable absence of cases on the lines of *Bendall* v. *McWhirter*.

[35] The two intrinsically separate problems overlap only in two respects. Obviously, for one thing, they both potentially affect occupancy of a family home but, more specifically, one must examine the nature of the debts for which the property is exempt from execution. Generally speaking, it will not be exempt from seizure for any debt forming a lien on the property itself (*e.g.*, jointly signed mortgages: Cal.Civ. Code, 1949, s. 1241 (3); Idaho Code, 1948, s. 55–1005 (3); jointly or singly signed mortgages to secure the purchase-money: Cal., *ibid.*, s. 1241 (2); Ida., *ibid.*, s. 55–1005 (2); Vt.Stats.Rev., 1947, s. 2619; Mass.Ann. Laws, 1955, c. 188, s. 1; La.Constit., 1921, Art. 11, s. 12; debts for work done on the lands: Cal., Ida., La., *ibid.*), judgments in tort against the owner himself (*Ehrlenbach* v. *Cox*, 206 Ala. 298; 89 So. 465 (1921); *Brun* v. *Mann*, 151 F. 145 (1906)) or claims to alimony by a former wife (*Littleton* v. *Littleton*, 224 Ala. 103; 139 So. 335 (1932); *Horan* v. *Horan*, 259 Ala. 117; 65 So. 2nd 486 (1953); *Coon* v. *Coon*, 264 Ala. 127; 85 So. 2nd 430 (1955); 17 Am.Jur. 490, Divorce and Separation, s. 642). Execution will only issue against the property, of course, in respect of debts of the owner.

[36] See, *e.g.*, Me.Stats.Rev., 1954, c. 112, ss. 66–68—exemption, c. 166, s. 35—joinder; La.Constit., 1921, Art. 11—exemption, La.Stats.Rev., 1951, ss. 2801–4—joinder.

[37] Alberta, British Columbia, Manitoba, Saskatchewan. New Zealand after operating its Joint Family Homes Act for five years with a financial limitation, ultimately abolished it in 1955.

[38] In the East, for example, New York (N.Y.C.P.A., s. 671) and Vermont (Vt.Stats.Rev., 1947, s. 2610) still only grant exemptions of $1,000 (£360) and Maryland (Md.Ann. Code, 1951, Art. 83, s. 8) and Pennsylvania (Pa.Stats. Ann., 1930, s. 2164) only give *general* property exemptions, of $100 (£36) and $300 (£108) respectively. In the West, on the other hand, there has been considerable legislative activity in recent years, perhaps as an additional lure to immigrants from the East. California now grants the head of a family the largest exemption in any U.S. homestead system—$12,500 (£4,465)—since its amendment of 1953 (Cal.Ann.Stats., 1953, c. 943, s. 1; Cal.Civ. Code, 1949, s. 1260).

from present English machinery, of course,[39] yet it hardly fulfils the purpose of preserving a roof over the head of the unfortunate debtor.

The meagreness of the exemption has also had repercussions on questions of the transferability of the homestead interest. Property worth *more* than the value of the exemption can certainly be *designated* homestead—this much is now clear, although not self-evident[40]—but does this imply that joinder is required for all the property designated, or only for so much as is covered by the exemption? In view of the beneficial aims of the system, the courts have decided quite rightly that both husband and wife must join in dispositions of *any part* of the homestead, for otherwise it would be possible for a husband to sell, for example, $19,000's worth of his $20,000 house, leaving the purchaser to evict his wife and pay her the value of the exemption.[41] The actual result reached is wholly consistent with the aims of the device—the wife keeping the right to veto the sale of the property however much it may be worth—yet the fact that there has been litigation on the question at all shows the need for care in future drafting.

1. *Dedication and Abandonment of the Homestead*

The majority of American jurisdictions require no formality for the claim to homestead rights. The fact that the property is occupied *as a home* is enough to stamp it with a special character and the householder or his wife need only raise a verbal claim as and when required. On the other hand, several states require the claimant to file either a separate declaration,[42] or either a separate declaration or a statement in the conveyance,[43] before they will designate the land homestead. The important feature in both these forms of protection is that it is made *dependent on the action of the householder* and is not a consequence imposed automatically by the law. To say, as some courts have,[44] that this leaves the

[39] Under the most recent amendments to the law relating to the enforcement of judgments, a creditor may no longer seize land under a writ of *elegit* but powers of charging it with the payment of the judgment debt and of appointing receivers of the income are substituted (see Administration of Justice Act, 1956, ss. 34–36). The "liberalisation" of the chattel exemption to £20 (*ibid.*, s. 37) still leaves the debtor in an unenviable position.

[40] See *Hargadene, McKittrick & Co.* v. *Whitfield*, 71 Tex. 482, 491; 9 S.W. 475, 479 (1882).

[41] See *Clarke* v. *Koenig*, 36 Neb. 572; 54 N.W. 842 (1893); *Edwards* v. *Simms*, 8 Ariz. 261; 71 P. 902 (1903). *Cf.* the very capable judgment in *Meisner* v. *Hill*, 92 Neb. 435; 138 N.W. 583 (1912), where the Supreme Court of Nebraska drew a clear distinction between the various functions of the homestead device and refused to accept their interdependence.

[42] *e.g.*, Cal. Civil Code, 1949, ss. 1262–4, 1266–8; Idaho Code, 1948, ss. 55–1203–5, 55–1302–4; Wash.Rev. Code, 1951, c. 6.12.040–070; Ariz. Code Ann., 1939, ss. 24–502; 24–503; W.Va. Code Ann., 1955, s. 3912; Me.Stats.Rev., 1954, c. 112, s. 69.

[43] *e.g.*, N.Y. Civil Practice Act, s. 672; Mass.Ann. Laws, 1955, c. 188, s. 2; Colo. Rev.Stats., 1953, c. 118–6–18.

[44] *Spiedel* v. *Schlosser*, 13 W.Va. 686 (1879); *Cohen* v. *Davis*, 20 Cal. 187 (1862).

householder a choice of action—whether to claim a homestead or not—seems to ignore reality. It is not difficult to imagine a huge majority of husbands being only too ready to seek protection for their families if it is available and adequate and, should a man hesitate because he fears to share his absolute ownership, it is precisely here that the law should act independently of him for the welfare of his family.[45]

This difficulty apart, the basic defect of the present practices in the United States is that a prospective purchaser will have no notice of the nature of the property with which he is dealing, and so is likely to have his interest terminated if it later appears that the vendor's wife ought to have joined in the conveyance. Ownership-minded as always (rather than family-minded), the Morton Commission went to pains to point out the disadvantages of putting a third party in an "unsatisfactory and insecure position,"[46] yet clearly thought that total protection for a wife *and* fairness to third parties were mutually exclusive. Surely, if the dedication already discussed were to be made a *compulsory procedure* every time a married man or woman (or single persons intending to marry) bought a house for use as a matrimonial home, neither interest would suffer? A formal declaration required to be registered with, or contained in, the title deeds[47] will leave no doubt in a purchaser's or mortgagee's mind as to what he is dealing with and what kind of instrument he should require from the vendor or mortgagor. Even where he might ordinarily find difficulty in discovering the nature of the premises, *e.g.*, whether they are used for domestic or business purposes,[48] the Register would reveal the truth. Sections 198 and 199 of the Law of Property Act would operate so far as concerns notice to third parties.

In addition, a formal declaration of abandonment of the homestead would be desirable. This could take the form already prescribed by some of the states[49]—an actual declaration that the parties are ceasing to use the property as their home, or a statement to the same effect in the conveyance or other disposition.

[45] The argument in these cases assumes, of course, some public knowledge of the availability of the protection. In fact, in many places the Bar is singularly ignorant of the supposed benefits and so cannot pass the knowledge on to its clients: *cf.* Pihl, "Homestead in Massachusetts," 20 Boston Univ.L.R. 81 (1940). Examination of the near-empty homestead registers and some familiarity of the writer with New England conveyancing practices only confirm him in this conclusion.

[46] Report, s. 665.

[47] It is imposing little to ask that a statement of intended use as a family home be recited in the conveyance or even the fact of the marriage entered in one of the Land Charges Registers. Presumably the existing s. 10 (1) Class D (ii) and Class D (iii) of the Land Charges Act, 1925, are inadequate for this purpose and so a new category would be called for.

[48] See fact situations similar to those in *Woodcock* v. *Hobbs* [1955] 1 All E.R. 445 and *Dillon* v. *Dillon* [1956] N.Z.L.R. 162, for example.

[49] *e.g.*, Cal. Civil Code, 1949, ss. 1243–4; Idaho Code, 1948, ss. 55–1007–8.

Whichever type of declaration is used, it would have to be surrounded by the procedural formalities outlined below.[50] It would be the only event, apart from the judicial dispensations to be dealt with shortly, which would terminate the homestead rights—for, until both parties filed the declaration, there would be no question whether they intended to give up their home or not. It would still be their homestead.

2. *The Requirement of Joint Consent in Dealings with the Homestead* [51]

(*a*) *The form of the consent.* The form which the joinder of a spouse must take is prescribed by the statutes creating the homestead rights. It varies from state to state—from "an instrument . . . executed and acknowledged by both husband and wife" [52] to "the consent of the wife expressly set forth in the act and signed by her" [53] and "the voluntary signature of the wife acknowledged or examined before an authorised officer." [54] The consent must always be free and since, therefore, duress,[55] undue influence [56] and fraud [57] will always vitiate it, there is a need for some statutory form which will give adequate protection to a wife.

Section 3 (1) of the Saskatchewan Homesteads Act [58] provides model safeguards. The wife must appear before either a district judge, or a local registrar of the Court of Queen's Bench (or his deputy), or a registrar of land titles (or his deputy), or a solicitor, or a justice of the peace, or a notary public, be examined "separate and apart" from her husband, and acknowledge that she knows her rights in the homestead and signs the instrument freely and without compulsion. No person who is interested in the preparation of the documents in the transaction is competent to take the acknowledgment. This is the kind of documentation than an English Homestead Act would need—assuring the wife of independent legal advice and nominating, say, Commissioners, independent solicitors, magistrates and Registrars

[50] pp. 467–468.

[51] The same machinery would apply to both conveyances and mortgages with the addition that in regard to mortgages, the recommendation of the Royal Commission (s. 678) giving the wife the power to apply to the court when she had contributed to the repayment of the mortgage loan, should be retained. The court would then be able to adjust the rights of the parties in the light of the contributions each had made to the actual price of the property.

[52] *e.g.*, Cal. Civil Code, 1949, s. 1243; Neb.Comp.Stats., 1929, s. 40–104.

[53] *e.g.*, La.Rev.Stats., 1951, Tit. 9, s. 2801.

[54] *e.g.*, Ala. Code, 1940, Tit. 7, s. 626; Fla.Stats.Ann., 1951, c. 693.03.

[55] *Hayden* v. *Latch*, 191 Iowa 469; 182 N.W. 868 (1921).

[56] Though consent given because "she was tired of being nagged by her husband" had been held to be voluntary: *Mid-West Lumber Co.* v. *Wagner*, 133 Kan. 405; 300 P. 1067 (1931).

[57] *Coles* v. *Yorks*, 28 Minn. 464; 10 N.W. 775 (1881); *Spiegel* v. *Spiegel*, 64 Mich. 345; 31 N.W. 328 (1887).

[58] R.S.S., 1953, c. 111, s. 3 (1).

(or other officials of High Court or County Court Registries) to supervise the recording of the consent.[59]

(*b*) *Dispensation with consent.* To give a spouse such a blanket-veto on all dispositions of the home, however, would leave out of consideration all those varieties of marital disorganisation in which the giving of common consent would be either impractical or unfair. Our most recent experiences in this country have been ones of disorganisation for which the *owner* of the home has been primarily responsible—and since the owner has usually been the husband, the rights of a *deserted wife* have been to the forefront.[60] It is quite right that the law should protect her occupational interest, of course, but our scheme of legislation ought to contain machinery allowing the court to give an owner his *present* rights of free disposition in circumstances where the marriage has broken down and the spouses are living apart.

In fact, the treatment afforded to this branch of the subject in the United States has been distressingly inadequate. Only a few states have dealt in their statutory schemes with questions of desertion or other disorganising factors,[61] with the result that several cases have produced rather ludicrous results. In Alabama, for example, the sale of a homestead by an owner whose wife was mentally incapacitated and so unable to give consent, was invalidated even though it was an economically sound move and no hardship resulted.[62] Similarly, desertion coupled with adultery has both been accepted [63] and rejected [64] as a factor destroying the non-owner's right to homestead protection, in one case the deserting and adulterous wife even being allowed to defeat her husband's joinder-less sale after a desertion of over twenty years.

The Canadian legislation on the subject, however, is very comprehensive and contains the elements of proper safeguards for all parties concerned. Three provisions may be suggested which will cover most of the field and establish a scheme of judicial testing of the right to join the transaction *before it is completed.* Again, the third parties involved will be freed from any uncertainty concerning

[59] The procedure contemplated is not without predecessor in this country: see the provisions of ss. 79–80 of the Fines and Recoveries Abolition Act, 1833 (3 & 4 Will. 4, c. 74), relating to married women's acknowledgments of deeds executed for the purposes of the Act.

[60] Full documentation on this point is unnecessary. The writer is referring to the whole string of authorities starting with rent restriction cases such as *Brown* v. *Draper* [1944] K.B. 309; [1944] 1 All E.R. 246, continuing through *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307, and ending for the moment with *Churcher* v. *Street* [1959] 1 All E.R. 23.

[61] *Cf., e.g.*, Ill.Rev.Stats., 1957, c. 68, s. 11; Iowa Code Ann., 1949, s. 28.597.6, 10; Tex. Civil Stats., 1925, ss. 4618–4619.

[62] See *Lewis* v. *Lewis*, 210 Ala. 112; 96 So. 869 (1916). *Cf. Lazenby* v. *Lazenby*, 229 Ala. 426; 157 So. 458 (1934).

[63] *Coe* v. *Nelson*, 59 S.W. 170 (Tenn., 1900); *Freed* v. *Sallade*, 245 Ala. 505; 17 So. 2nd 868 (1944).

[64] *Murphy* v. *Renner*, 99 Minn. 348; 109 N.W. 593 (1906).

the validity of their interests. In each case, dispensation would be made by an authorised judge *in the exercise of his discretion*,[65] on application by any person interested.[66]

A. *Where the husband and wife are living apart by agreement* [67]

Some of the provinces require that the separation be "under circumstances disentitling the wife to alimony," [68] or for a number of years,[69] but such additions are unnecessary. All the circumstances can be considered by the judge when application is made to him—the adultery of either party,[70] the length of the separation, the present whereabouts and circumstances of the absent party,[71] and the whole context of the separation.

B. *Where the* OWNER *of the homestead has deserted, is insane, or is in prison* [72]

The non-owning spouse still resident in the home should have the right in these circumstances, acting in the interests of the family, to apply for authority to sell or encumber the homestead property without joining the absent owner. It is obvious that economic difficulties may beset a family and make it expedient for them to move to different premises and the mere unavailability of the owner—perhaps by his own fault—should not stand in the way of family welfare. The judge must, however, take particular care to avoid abuse of any such power: for example, he should always require reasonable searches to be made for the deserting owner and make certain that the spouse makes the application for the benefit of the family, rather than for his or her own personal benefit.[73]

[65] A power similar to that at present exercised under s. 17 of the Married Women's Property Act is contemplated. *Cf.* Report, s. 675.

[66] *Cf.* R.S.S., 1953, c. 111, s. 7 (2). This would include purchasers and creditors as well as family members.

[67] *Cf.* R.S.A., 1942, c. 206, s. 8 (1).

[68] R.S.S., 1953, c. 111, s. 3 (2).

[69] R.S.M., 1954, c. 65, s. 11—two years.

[70] If the guilty spouse has not left the matrimonial home, the adultery should not affect the right to join in the transaction unless the offence has made further cohabitation intolerable. *Cf. Cristel* v. *Cristel* [1951] 2 K.B. 725, 731; [1951] 2 All E.R. 574, 577, where Denning L.J. recognised that the adultery *might* be a ground for an application for the court's discretion under s. 17. And see Sheridan, (1953) 17 Conv.(N.S.) 440, 451. Mrs. Shachor-Landau's advocacy of direct eviction by the innocent party ((1957) 6 I.C.L.Q. 61, 63) would hardly seem to have the blessing of English social opinion!

[71] Since homestead provisions are purely local to each state, there seems to be some idea—hard to rationalise—that leaving the state implies something more serious than simple desertion *within* the state: see, *e.g.*, R.S.S., c. 111, s. 7 (1); R.S.A., c. 206, s. 8 (1); Ala. Code, 1940, Tit. 7., s. 655; Ill.Rev.Stats., 1957, c. 68, s. 11.

[72] See note 61, above, and Ala. Code, 1940, Tit. 7, s. 655.

[73] It might even be desirable to adopt a provision similar to s. 11 of the Manitoba Dower Act (R.S.M., c. 65, s. 11), which gives the judge dispensing with the consent power to order payments, or a charge on the homestead, for the benefit of the absent spouse.

C. *Where the* NON-OWNER *has deserted, is insane, or is in prison* [74]

Here again, the court would have to take into consideration the circumstances of the absence and weigh the interest of the owner in wanting to sell or encumber the property with that of the absent spouse in having a home to which to return when necessary. The wishes of such a spouse should be taken into account wherever possible (with the same searches, etc. as outlined above), though the veto of an insane spouse's guardian should not override the discretion of the court.

DISPOSITION OF THE HOMESTEAD ON DIVORCE

Sections 687–698 of the Morton Commission's Report contain provisions "for dealing with the occupation of the matrimonial home and the division of the contents after a decree of divorce, nullity or judicial separation." At least in this field the Commission has freed itself from its deep attachment to "legal ownership" as being the criterion in matrimonial property dealings and has recognised the power of a competent court to adjust the spouses' property relations in such a way as to "give effective recognition . . . to the wife's contribution to the marriage, whether by her work in the home or by the help she has given her husband in building up or running his business." [75] As it points out in section 688, however, to give a wife a right to, or to the occupation of, her husband's home is merely a variation on the normal practice of making financial provision for her and so the extension of existing powers is very small.

It is much fairer that the matrimonial home be considered separately in this context. Whatever the cause of the divorce or separation and whichever party is primarily responsible for bringing the marriage to an end, they will both need a home when they are divorced: "they can no longer use and occupy it as a home. So long as the marriage relation continues, he, with her, has this right. But a divorce and separation being found necessary, the court must make such order in relation to it as the circumstances will justify, and as seems just and equitable." [76] And what justification is there for allowing "guilt" and "innocence" to affect the right to claim the right to stay in the home after the divorce, as the Commission suggests? [77] The "guilty" wife is not disentitled from claiming some financial support [78] or the custody of her children [79] and so why should the fact that her husband's

[74] *Cf.* R.S.S., c. 111, s. 3 (2); R.S.A., c. 206, s. 8 (1); R.S.M., c. 65, s. 11; Iowa Code Ann., 1949, s. 28.597.6; Tex.Civ.Stats., 1925, ss. 4618–4619.
[75] Report, s. 692.
[76] *Cole* v. *Cole*, 23 Iowa 433, 445 (1862).
[77] Report, s. 694.
[78] *Ashcroft* v. *Ashcroft* [1902] P. 270; *Waller* v. *Waller* [1956] P. 300; [1956] 2 All E.R. 234.
[79] *Allen* v. *Allen* [1948] 2 All E.R. 413; *Willoughby* v. *Willoughby* [1951] P. 184.

petition succeeded and (perhaps) hers did not, affect the right to future support?[80]

Hitherto, of course, the power to make an order giving a divorced wife possession of her husband's home has been found in section 25 of the Matrimonial Causes Act of 1950. The principle is

> "that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be his wife."[81]

The courts have held, and rightly, that the power extends not only to jointly owned homes[82] but also to those owned exclusively by one party only,[83] suitable adjustments being made in all cases in the financial allowance granted.

The award of the matrimonial home is, practically speaking, a species of maintenance[84] and so it is important that the party applying for possession or ownership *ask the court* in the petition or answer before it can deal with it. This is perhaps one of the more serious deficiences of present practices, both in England and in the jurisdictions operating homestead acts already. Take, for example, the position where a wife who obtains a divorce *fails* to ask the court for the use of her erstwhile home. In England there will be no power to make an order dealing with it and it will revert to its nominal owner (hypothetically, the husband) free from any of the wife's occupational rights.[85] Similarly, in Canada the courts have assumed that they have no power on divorce to grant a wife rights in her husband's homestead, for the protection exists only for wives and widows and not for divorced wives.[86]

[80] There is even less justification for this result where the proceedings are for nullity. By what standard does the Commission refuse the shelter of the home to an unfortunate woman incapable of consummating the marriage whose husband obtains a nullity decree?

[81] *Per* Denning J. in *Smith* v. *Smith* [1945] 1 All E.R. 584, 586. See also *Bacon* v. *Bacon* [1947] P. 151; [1947] 2 All E.R. 327; *Parrington* v. *Parrington* [1951] 2 All E.R. 916; *Halpern* v. *Halpern* [1951] P. 204; [1951] 1 All E.R. 315; *Hicks* v. *Kennedy*, 4 D.L.R. (2d) 320 (1956). The power, resting as it does simply on a piece of ingenious statutory interpretation is naturally very vulnerable (see the criticisms of the "unjustified extension," in *Prescott* (*orse.*) *Fellowes* v. *Fellowes* [1958] 3 All E.R. 55, *per* Hodson L.J. at p. 61; Romer L.J. at pp. 64–65) but in the absence of any other machinery to deal with the home on divorce, one must strongly oppose attempts to limit its operation. It is interesting to note that more recently, in *Brown* v. *Brown* [1959] 2 All E.R. 266, the Court of Appeal expressly approved *Smith* and sidestepped *Fellowes*.

[82] See cases in n. 81.

[83] *Harris* v. *Harris* [1954] C.L.Y. 1506.

[84] S. 25 allows both husband and wife to apply but in practice, when used by a wife, it becomes more of a claim to maintenance.

[85] *Robson* v. *Headland* (1948) 64 T.L.R. 596; *Vaughan* v. *Vaughan* [1953] 1 All E.R. 209. *Cf.* La.Rev.Stats., 1951, s. 2804.

[86] *Re Application of Schopp*, 10 W.W.R. (N.S.) 322 (B.C., 1953); *Re Application of Gate*, 12 W.W.R. (N.S.) 95 (B.C., 1954).

In the United States, the authorities are divided. Since many states require a homestead claimant to be the "head of a family," [87] they have insisted that if he ceases to qualify for such title on divorce, he can no longer claim homestead protection.[88] On the other hand, if the decree charges him with the maintenance of his wife or children, he is

> "still, in law, the head of a family, and is entitled to claim a homestead right and that right continues until his death, unless by his voluntary act he abandons the homestead." [89]

These authorities, of course, concern the owner's right to claim the homestead *exemption* after divorce: unless the court has express power by statute and receives an express application, it cannot prolong the non-owner's occupation.

The last-mentioned situation frequently arises, however. The California Civil Code, for example, contains a provision [90] requiring that the divorce court always make *some* disposition of the community property and the homestead, whether by partition, division or other means.[91] Texas provides that the court

> "shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate." [92]

This last limitation—inherent in the recommendations of the Royal Commission, which only envisages a transfer of ownership of the contents of the home [93]—is too strict. Although an order granting lifelong occupational rights will often be adequate, as in *Bush* v. *Bush*,[94] where the wife was over sixty years old and the children all of majority, or in *Berg* v. *Berg*,[95] where the wife was frail, old, nearly blind and unable to support herself, it may be that the court will want to make some more permanent provision for the wife and the

[87] See, *e.g.*, Cal.Civ.Code, 1949, s. 1261; Ida. Code, 1948, s. 55–1202, both of which describe what shall constitute a "family" for these purposes.

[88] See *Cooper* v. *Cooper*, 24 Ohio St. 488 (1873); *Holcomb* v. *Holcomb*, 18 N.D. 561; 120 N.W. 547 (1909); *Stanton* v. *State National Bank of El Paso*, 79 S.W. 2d 833 (Tex., 1935). Annot., 97 A.L.R. 1095.

[89] *Dougherty* v. *White*, 200 N.W. 884 (Neb., 1924). Annot., 36 A.L.R. 431; *Redfern* v. *Redfern*, 38 Ill. 509 (1865); *Woods* v. *Alvarado State Bank*, 118 Tex. 586, 19 S.W. 2d 35 (1929); *Osceola Fertilizer Co.* v. *Sauls*, 98 Fla. 339; 123 So. 780 (1929).

[90] S. 146. *Cf.* N.Y. Civ.Prac. Act, s. 1164–a, giving the court hearing the suit for separation or divorce the power to "give such directions as the nature and circumstances of the case require" with regard to property jointly held. See *Gelardi* v. *Gelardi*, 205 Misc. 348; 127 N.Y.S. 2d 802 (1953); *Nai* v. *Nai*, 129 N.Y.S. 2d 838 (1954).

[91] *Cf. Salveter* v. *Salveter*, 206 Cal. 657; 275 P. 801 (1929); *Huber* v. *Huber*, 27 Cal. 2d 784; 167 P. 2d 708 (1946).

[92] Tex.Civ.Stats., 1925, s. 4638. *Cf.* Ill.Rev.Stats., 1957, s. 52.5.

[93] Report, s. 691.

[94] 237 S.W. 2d 708 (Tex., 1950).

[95] 115 S.W. 2d 1171 (Tex., 1938).

children whose custody the court has given her. If the wife were to die shortly after the divorce, leaving any number of minor children, these children would then become the victims of her "life-only" occupation rather than its beneficiaries. Thus in *Mayer* v. *Mayer* [96] the court awarded the wife her husband's homestead, other property worth $18,000, $50 a month for life and the custody of their mentally retarded son; in *Scott* v. *Scott*,[97] it gave her the home, $5,000 and the custody of the child, in both cases leaving the husband well-enough provided for with assets still exceeding $20,000.

Perhaps another innovation called for in the light of modern conditions is the power to award occupational privileges in *any* case of marriage-failure, whether or not an actual petition for divorce evidences the failure. The Commission implicitly bars such a course by its insistence on the matrimonial offence as the criterion both for divorce and for barring claims for support,[98] but one can visualise countless situations in which two economically unequal and maritally constipated spouses have a genuine *need* of separate homes. To take two circumstances only: the courts should have a power to make an award of possession whether or not it grants a petition for divorce. If it refuses to divorce the couple, it seems most unlikely that they will blissfully resume their married life and one of them will have to leave the home; should not the court, in the interests (such as there are left) of the marriage, decide which one? [99] Secondly, on a petition for divorce, the courts should re-assess their powers of awarding possession to one party and excluding the other *pendente lite*. It is very possible to commit the gravest errors by an insistence on individual property rights and concepts of "family solidarity," to the ignoring of questions of physical danger and possible nervous disorientation, custody of children and the choice of reasonable alternative accommodation.[1] Admittedly, that an order giving possession to one party only in either of these circumstances would have the *prima facie* effect of a judicial separation, should be of no consequence: it is much wiser that the court should do this and let the parties do their own reconciling,[2] than condemn them, even temporarily, to unhappiness and possible ill-health.

[96] 266 Mich. 241; 253 N.W. 282 (1934). [97] 331 Mich. 273; 49 N.W. 2d 175 (1951).

[98] See Report, ss. 65–69, 694. Above, p. 470.

[99] This power is recognised in *Mason* v. *Mason*, 219 Cal. 111; 25 P. 2d 461 (1933). *Contra*, *McCotter* v. *Carle*, 149 Va. 584; 140 S.E. 670 (1927); *McAdoo* v. *McAdoo*, 137 Okla. 12; 277 P. 943 (1929).

[1] See esp. *Gorulnick* v. *Gorulnick* [1958] 1 All E.R. 146, and the writer's note in (1958) 21 M.L.R. 315. On a new trial of this case, Diplock J. gave the wife exclusive possession of the home and excluded her husband (*The Times*, July 14, 1958). *Cf. Massing* v. *Massing*, *The Times*, August 22, 1958; *Luitwieler* v. *Luitwieler*, 57 Cal.App. 751; 207 P. 931 (1922); *Spletzer* v. *Spletzer*, 200 Misc. 614; 110 N.Y.S. 2d 235 (1951).

[2] Or else allow them to separate and make use of welfare officers as conciliators: see the order made by Pearce J. in *Silverstone* v. *Silverstone* [1953] P. 174, 178; [1952] 1 All E.R. 556, 558.

PROVISION FOR A SURVIVING SPOUSE AND FAMILY

The Morton Commission made no recommendations with regard to the occupation or ownership of the matrimonial home after the death of the owner. That the examination of such questions was outside its terms of reference [3] is the reason, but here, as elsewhere in its regulation of domestic affairs, the law is in need of re-examination.

The present practices of the administration of intestates' estates which are of interest to us, are based on the Intestates' Estates Act of 1952. By paragraph 1 (1) of the Second Schedule to that Act—

> "where the residuary estate of the intestate comprises an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death, the surviving husband or wife may require the personal representative . . . to appropriate the said interest in the dwelling-house in or towards satisfaction of any absolute interest of the surviving husband or wife in the real and personal estate of the intestate."

The Schedule then goes on to decide in detail questions of the nature of the interest and of the home itself, and to lay down the correct procedures for making the appropriation.

In North America, on the other hand, such questions are dealt with by the homestead and dower legislation, which will usually contain provisions granting a surviving spouse occupational rights, lasting for the lifetime of the spouse or until the children attain majority, whichever occurs later. In the light of some of the details of the scheme—and especially of the recommendations already made in this article—a comparison of the effects of the two sets of provisions will prove fruitful.

Two main aspects need comment. First, under the present English legislation, the house which is subject to claim is that in which the *survivor* was living at the death of the owner. In other words, the house does not have to be the *matrimonial* home, provided that it is *a* home belonging to the deceased in which the other spouse was living—though the general state of economic affairs will mean that it will normally be the family home. Now, in circumstances of domestic agreement, this will cause little friction: but the provision clearly covers—although it may not intend to do so—the case of an existing separation caused by one of the spouses. If a wife has driven her husband out of his home by her cruelty and continued to live in it herself, she will be able to claim it *automatically* from the personal representative on her husband's death, while if she has been driven away *herself* by her *husband's* cruelty, she cannot "require" the representative to transfer it to her.[4] So,

[3] See Report, p. 1.

[4] The inconsistency of the position is even a little more remarkable when it is recalled that on an application for "reasonable provision" under the Inheritance (Family Provision) Act, 1938, as amended in 1952, the court would

on the face of it, some wives potentially lose their claims to the shelter of the home.[5]

The United States' homestead provisions are too patchy to be able to give any decisive lead on this point: authorities in a majority of jurisdictions hold that a matrimonial offence *may* destroy homestead rights after the death of the owner[6] and few states are prepared to go so far as not attaching any importance to desertion or adultery by the survivor.[7] The Canadian provinces, too, show some consistency of approach in the same direction in providing that where the wife "is living apart from her husband under circumstances disentitling her to alimony," she cannot claim any occupational privileges under the legislation.[8] If any question arises as to whether a particular wife merits this classification, a judge of the Probate Court will hear argument on and decide the issue.[9]

What is called for in the proposed English homestead scheme is some kind of provision for the widow which can be judicially tested before it becomes effective. All that need be done is to redraft paragraph 1 (1) of the Second Schedule to the 1952 Act.[10] If the house which the suvivor could claim were "the home in which the spouses last lived together before the death of the intestate" and, instead of the personal representative being "required" to appropriate it towards the survivor's interest, he had power to refer the claim to the court for instructions, the way would be clear to test the merits of all the claims. The granting of the occupation of the home would then depend on such matters as the need of the claimant for some shelter,[11] the interests of the children of the marriage,[12] or, if there is no need and there are no children, the

have to consider the conduct of the wife towards her deceased husband in making an award (s. 1 (6), as amended).

5 It is difficult to assess what the potential result of including divorced wives in the category of claimants would be, before seeing the new Matrimonial Causes (Property and Maintenance) Act, 1958, in operation. By s. 3 of that Act, a former wife of a deceased person may apply to the court for reasonable maintenance from the deceased's estate. The writer feels that perhaps she should not be able to apply for occupational rights in the home, so great are the potential obstacles—her former husband may have remarried and his later wife be making the same claim; he may have sold the home; the former wife will necessarily have been living elsewhere since the dissolution of the marriage and, in any case, would have had the opportunity to claim the home in the divorce court. (See above, pp. 470–473.)

6 See, *e.g.*, *Cameto's Estate*, Myrick, Prob.Ct.Rep. 42 (Cal., 1873); *Somers* v. *Somers*, 27 S.D. 500; 131 N.W. 1019 (1911); *Prater* v. *Prater*, 87 Tenn. 78; 9 S.W. 361 (1888); *Coe* v. *Nelson*, 59 S.W. 170 (Tenn. 1900).

7 *Duffy* v. *Harris*, 65 Ark. 251; 45 S.W. 545 (1898); *Lyons* v. *Lyons*, 101 Mo.App. 494; 74 S.W. 467 (1903).

8 R.S.A., 1942, c. 206, s. 4 (2); R.S.B.C., 1948, c. 364, s. 5 (2); R.S.M., 1954, c. 65, s. 22 (1); R.S.S., 1953, c. 111, s. 3 (2).

9 R.S.A., c. 206, s. 4 (4); R.S.M., c. 65, s. 22 (2).

10 The relevant part is set out above, p. 474.

11 *e.g.*, if the husband drove his wife from the home by his cruelty, or if they separated by agreement, and her present economic standing is seriously low.

12 *e.g.*, even if the wife has deserted and lived in adultery, it may be necessary to provide a home for her children. There can be no justification for visiting her sins upon them. *Cf. Murphy* v. *Renner*, 99 Minn. 348; 109 N.W. 593 (1906).

relationship between the survivor and the deceased.[13] Since the present machinery assumes that a person is the best judge of his or her own needs and leaves it to him to opt for or against the right to the home, no amendment is called for here.

Lastly, under the Intestates' Estates Act, the survivor's claim may only be set off against his absolute interests under the intestacy. These may be either the whole estate (if there are no other surviving family members), £20,000 and the personal chattels (if there are no children surviving but other specified relatives), or £5,000 and the personal chattels (if there are children surviving).[14] Certainly, if the survivor becomes entitled to the larger figure, he will be able to appropriate the home in the vast majority of cases but there will be a larger proportion of instances in which it is worth more than *five* thousand pounds and it hardly seems in accordance with the principle of allowing the appropriation at all to require, as the Act does,[15] that the survivor must settle the balance by a cash payment. If she is to be entitled to a home, that should be an end of it: there should be no quibbling about the actual sale value of the property.

But this is only the position on intestacy. If the owner of the property leaves a will, there is nothing to prevent him from devising the home away from his wife and family—which would certainly not be very compatible with the suggested restriction on his power to alienate it during his lifetime without her consent. Even the Inheritance (Family Provision) Act, as amended in 1952, provides no machinery for allowing a disinherited wife or husband to claim *the home itself* as part of the "reasonable provision" and a mere *financial* allowance is hardly a substitute for an attachment to a particular home or a palliative for all the difficulties involved in moving out and finding another one. To suggest the reintroduction of dower and curtesy at this stage of legal development would hardly be any acknowledgment of twentieth-century trends in property law,[16] but once again the writer proposes the adoption of

[13] If the wife has deserted her husband and, at the date of his death, is still being maintained by the man with whom she has been living, the court may perhaps feel that her claim to the home is purely wanton and made just for the purpose of enriching herself.

[14] Intestates' Estates Act, 1952, s. 1 (2).

[15] *Ibid.*, 2nd Sched., para. 5 (2).

[16] These devices, usually combined and simply called dower, still survive in a majority of American and Canadian jurisdictions. To a large extent, the states have extended their operation to interests in both realty *and* personalty and the extent of provision for a surviving spouse (in the different jurisdictions) varies between a life interest and an absolute interest in the property. Since dower then becomes a general substitute for the kind of intestate provision familiar in England since 1925, it has tended to push the post-mortuary provisions of the homestead laws into the background and, indeed, the general trend has been, as in England before the 1952 Act, to look away from the particular provision of a home towards sufficient provision generally. For this reason, the general rule is that a survivor must elect between the will and the homestead, just as he must elect between the will and dower, assuming that the will makes some inconsistent provision for him. See at length, Vernier, *American Family Laws*, Vol. III, pp. 345–575 (1935); Haskins, "The Development of Common Law Dower," 62 Harv.L.R. 42 (1948).

legislation similar to that in force in Canada, smacking, to a certain extent, of these older forms of post-mortuary protection. To do so—to make any devise of the matrimonial home subject to a life estate for the widow [17]—is simply to complete the cycle of the homestead protection and to recognise that the provision begun to be made by the 1938 Act and substantially increased in 1952, is still not wholly adequate.

EQUALITY OF OPPORTUNITY FOR HUSBAND AND WIFE

This article has been concerned primarily with the protection of a wife or widow simply as a means of dealing with the plethora of modern authorities in which it has been the wife who has needed protection. But, as other authorities show [18] and as the Morton Commission recognised,[19] the problems are by no means exclusively feminine in gender. The increased stature of the married woman in the world of today has not only brought an appreciation that the law should protect her by removing cumbersome disabilities but also a recognition, based on her modern earning capacity and status as a property holder, that she should take her due share of the responsibilities of running the home and family. It is no longer true that no woman holds property: even less that no woman owns the house she and her husband live in. On the other hand, no-one can pretend that exclusive ownership on her part is anything more than a subsidiary to the larger classes of male- and joint-ownership, but the mere fact that the numbers are comparatively small is no reason to waive the duties now heaped on the owner-husbands. There should not be "one measure of justice for the husband and another for the wife." [20]

To a large extent, the present homestead laws of the United States show reciprocal provisions.[21] Surprisingly enough, though, of the four Canadian provinces which have adopted the system, only one—Manitoba [22]—grants a husband the same rights in his wife's home as it grants her in his. Difficult as this phenomenon is to explain—we could only justify it by supposing a negligible

[17] R.S.A., 1942, c. 206, s. 4 (1); R.S.B.C., 1948, c. 364, s. 5 (1); R.S.M., 1954, c. 65, s. 12; R.S.S., 1953, c. 111, s. 12. Perhaps a more satisfactory provision would be one which also took account of minor children. The homestead estate would then terminate on the death of the widow or the happening of the event which would have terminated the father's duty of maintenance to the youngest child, had the father been alive, whichever occurred later.

[18] See *Copeman* v. *Copeman* (1953) 103 L.J. 624. In fact, the county court judge's approach to the problems involved here must remain very dubious.

[19] Report, s. 681.

[20] *Peychers* v. *Peychers* [1955] N.Z.L.R. 564, 570.

[21] For exceptional cases which do not allow a husband a homestead in his wife's property, see Ga. Code Ann., 1938, c. 51.701 and *Luke* v. *Cook*, 29 Ga.App. 492; 115 S.E. 919 (1923); Ky.Stats.Rev., 1953, s. 427.060 and *Forsythe* v. *Morgantown Deposit Bank*, 252, Ky. 680; 28 S.W. 2d 114 (1934); La.Stats.Rev., 1951, Tit. 9, ss. 2801–4 and *Bank of Lafayette & Trust Co.* v. *Fabre*, 169 La. 1185; 126 So. 916 (1930).

[22] R.S.M., 1954, c. 65, s. 23.

amount of property holding by married women in the Dominion—it is certainly inappropriate for this country and there is every reason to follow the opinion of the Royal Commission and the general trend in the United States.

The recommendations of the Royal Commission on Marriage and Divorce concerning the matrimonial home show the short-sighted conservatism with which too many of our responsible administrators are endowed. Far from putting forward any scheme likely to end the judicial chaos of recent years, the continued emphasis on "property ownership," "family solidarity" and "matrimonial offence" as solid criteria by which to judge the domestic community, only perpetuates the courts' dilemma and wedges open the door to injustice. Perhaps it is some measure of the reaction to the proposals that no-one has yet taken steps to implement—or, far wiser, supersede—them. The writer hopes that some of the suggestions made here may serve as a basic point of departure for legislative action in the near future and that their transatlantic flavour will not hide their essential attractiveness. They represent lessons learned by experience.

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POSSESSION OF THE MATRIMONIAL HOME IN AUSTRALIA

In recent years, the Australian courts have had before them a number of cases on the problems associated with this topic. The more noteworthy of them are mentioned herein.[1]

1. Husband and Wife Cases

It may be thought that it is rather late in the day to raise the point whether a husband can bring an action for the recovery of land against his wife. However, the English acceptance of the view that he cannot obtain possession, at least of the matrimonial home, except by an order of the court under the Married Women's Property Act, 1882, s. 17, stems mainly from doubts expressed *obiter* by Goddard L.J. (as he then was) to the effect that ejectment proceedings are tortious and therefore precluded by section 12 of the 1882 Act [2]; it has never been expressly decided. The English view was followed first by the Full Supreme Court of N.S.W.,[3] and then by the Supreme Court of Victoria, in a case in which Herring C.J. was at pains to emphasise the truly discretionary nature of the jurisdiction, in support of his contention that, despite the views of certain judges, the wife did not have a right of a proprietary character, but merely a licence from her husband to remain in occupation.[4] The nature of the licence was not elucidated.

The Victorian legislature has, since the decision last mentioned, carried out the reform, suggested by the Report of the Royal Commission on Marriage and Divorce,[5] that the remedies in tort given to the wife by section 12 of the Married Women's Property Act, 1882 (Eng.) as against her husband, for the protection and security of her property, should also be conferred reciprocally on the husband.[6] The Report contemplated that the remedies conferred on a husband or wife by an amended section 12 would be subject to the rights in respect of the matrimonial home which were provided for both husband and wife in their recommendation.[7] This has not

1 The earlier cases were noted by G. H. L. Fridman in (1954) 17 M.L.R. 82.
2 *Bramwell* v. *Bramwell* [1942] 1 K.B. 370, 373–374.
3 *Henderson* v. *Henderson* (1950) 51 S.R.(N.S.W.) 217 (noted (1954) 17 M.L.R. 83); but see *Aaron* v. *Aaron* (1944) 61 W.N.(N.S.W.) 93, in which Street C.J. held that a husband might sue his wife in ejectment if he alleged no wrongful act and claimed no damages.
4 *Public Trustee* v. *Kirkham* [1956] V.L.R. 64. For a valuable discussion of the scope and exercise of the court's decision, see *Re Grose* [1958] Qd.R. 269.
5 Cmd. 9678 (1956), para. 704.
6 Marriage (Property) Act, 1956 (Vic.), s. 6 (replaced now by Marriage Act, 1958 (Vic.), s. 160).
7 See para. 685.

been followed in the Victorian legislation, and there thus seems prima facie to be no good reason why a husband should not now be able to proceed against his wife in ejectment for possession of the matrimonial home, just as the wife is seemingly able to do against her husband.[8] However, Professor O. Kahn-Freund has asserted that the doctrine of the licence to remain in the matrimonial home does not rest wholly on section 17, but is a right on which reliance may be placed in all proceedings between husband and wife.[9] On this basis, the plaintiff *husband or wife* would have to satisfy the court that he or she had a case for revoking the licence. Indirect support for this view may be found in the injunction cases, and particularly in the most recent of these, in which the Court of Appeal considered that section 12 did not give the wife an absolute right to exclude her husband from the matrimonial home which she owned, the matrimonial home differing from other property.[10] But the Australian courts have, for many years, been prepared to deal solely with the wife's proprietary rights, without prejudice to the right of consortium or any other matrimonial considerations.[11] So far as Victoria is concerned, this matter is complicated by section 7 of the new Act [12] (corresponding to section 17 in England) providing that where any question which could have been raised for decision in proceedings under section 7 arises in any other proceedings, "it shall be determined upon the same principles as if it had been raised for decision in proceedings" under section 7. If this means what it seems to say, then the husband, in most cases, may be no better off than before, and the wife may be worse off. Certainly, it seems preferable to have all such disputes subject to the discretionary jurisdiction.

2. The Tenancy Cases

In 1953, the N.S.W. Full Court had reluctantly followed the English cases in deciding that a husband who was the tenant of the matrimonial home which was subject to rent restriction legislation could not surrender his lease while his wife remained on the premises.[13] It is clear, however, that the Victorian courts were following their own path even before the new legislation (whatever effect the latter may have), for Herring C.J. declined, on similar facts, to follow

[8] *Nilan* v. *Nilan* (1951) 68 W.N.(N.S.W.) 271; *cf.* the English injunction cases, *e.g.*, *Shipman* v. *Shipman* [1924] 2 Ch. 140.

[9] *Matrimonial Property Law* (1955, ed. W. Friedmann), p. 300.

[10] *Gorulnick* v. *Gorulnick* [1958] P. 47.

[11] *e.g.*, *Lane* v. *Lane* (1913) 13 S.R.(N.S.W.) 657. *Cf.* position in Scotland in all property disputes between the spouses, *e.g.*, *Millar* v. *Millar*, 1940 S.C. 56.

[12] Replaced now by Marriage Act, 1958 (Vic.), s. 161.

[13] *Webb* v. *Diethe* (1953) S.R.(N.S.W.) 190 (noted (1954) 17 M.L.R. 84); *cf. Maver* v. *Pennock* [1956] S.R.(N.S.W.) 250. New Zealand seems also to have adopted the English position: see *Robertson* v. *Te Awhitu* [1954] N.Z.L.R. 541. In *Killiby* v. *Farthing* (1954) 55 S.R.(N.S.W.) 85, the N.S.W. Full Court refused to apply the same rule where the position of the spouses was reversed. In view of *Dickson* v. *McWhinnie*, noted *infra*, *Webb* v. *Diethe* would appear to have a short life before it.

the N.S.W. case and the English decisions on which it was based.[14] Actually, he sought to distinguish the English cases on the grounds that there were differences between the English and Victorian Acts, although these differences seem insubstantial. It would appear that there is no real conflict with the English cases in that in those cases there was no doubt that the husband was a statutory tenant. The possible conflict is as to the position of the wife where the husband terminates his contractual tenancy by giving notice to the landlord. The English cases have not yet provided an answer on this point.

3. The Purchaser Cases

The trend away from the English line of authority is more apparent in the case of the matrimonial home sold by the husband over his deserted wife's head. An earlier Victorian decision [15] that the right of a wife, whether or not deserted, to remain in possession was a personal one which was maintainable only against her husband, and accordingly gave her no protection against purchasers from the husband, with or without notice, was followed by the Supreme Court of South Australia in a case in which, unlike the Victorian case, there was no doubt about the husband being in desertion, the decision being therefore that much stronger, but it was again the decision of a judge of first instance.[16] These cases have now received, in N.S.W., the approval of the first Full Court in Australia to deal with this matter.[17]

The court, consisting of Street C.J., Owen J. and Roper C.J. in Equity, in a lengthy discussion of the English cases, sought to minimise three troublesome Queen's Bench Division cases,[18] and stated that unless they could be regarded as being in a special category it was of the opinion that they were wrongly decided. The second alternative seems to present less difficulties than the first. The two main obstacles set up by the Court of Appeal were sought to be distinguished. *Bendall* v. *McWhirter* [19] was to be regarded merely as an authority for the proposition that in England a trustee in bankruptcy stands in the bankrupt's shoes and cannot recover

[14] *Adamson* v. *Busch* [1955] V.L.R. 450. Herring C.J. followed the doubts of Sholl J. (*obiter*) in *Brennan* v. *Thomas* [1953] V.L.R. 111. See also conflict of opinion in *Re Austin* (1955) 72 W.N.(N.S.W.) 288.

[15] *Brennan* v. *Thomas*, *supra* (noted (1954) 17 M.L.R. 83 in this respect), following *Thompson* v. *Earthy* [1951] 2 K.B. 596.

[16] *Maio* v. *Piro* [1956] S.A.S.R. 233. It was apparently assumed that the plaintiff had constructive notice of the wife's rights, but no reference was made to *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7, decided one year earlier, which might have led the court to a contrary conclusion on the facts. The decision in the latter case is also inconsistent with the statement in *Maio* v. *Piro* that, on the basis of the English cases, the purchaser's position is even weaker if he has merely an equitable estate, as was the case here.

[17] *Dickson* v. *McWhinnie* [1958] S.R. (N.S.W.) 179 (a case of alleged constructive notice on the part of the purchaser).

[18] *Ferris* v. *Weaven* [1952] 2 All E.R. 233; *Savage* v. *Hubble* [1953] C.P.L. 416; *Street* v. *Denham* [1954] 1 All E.R. 532.

[19] [1952] 2 Q.B. 466.

possession of premises, owned by the bankrupt, but occupied by the latter's deserted wife, which were formerly the matrimonial home, without an order under section 105 (1) of the Bankruptcy Act, 1914. *Jess B. Woodcock & Son, Ltd.* v. *Hobbs*[20] should be regarded as authority only for the proposition that a county court judge in England had a discretion in an action for possession to postpone for a reasonable time, in an appropriate case, the execution of an order for possession. It is difficult to agree with this contention. However unsatisfactory it may be, the majority of the Court of Appeal in *Woodcock* v. *Hobbs* appears to have made it quite clear that a deserted wife has an equity to remain in occupation, and that this is binding on a purchaser with actual or constructive notice thereof, even though the court has a discretion to terminate the equity.[21]

The kernel of the N.S.W. decision is found in the following quotation:

> "Notwithstanding the many expressions of opinion by Lord Denning, we think, with all respect, that a deserted wife has no interest, legal or equitable, in the matrimonial home, and no equity, as we understand the word, enforceable against a purchaser of the land whether with or without notice of her occupancy and that she is a deserted wife. The utmost that can be said, in our opinion, is that where proceedings by that purchaser to recover possession are taken against the wife in a court which has a discretion to postpone execution of its order, the facts that the premises sought to be recovered were the matrimonial home and that the wife is a deserted wife are circumstances to be considered in the exercise of whatever discretion there is to postpone the date for giving up possession. We are of opinion that *Thompson* v. *Earthy* was rightly decided and we agree with what Roxburgh J. said in that case. If, contrary to our opinion . . . *Bendall* v. *McWhirter* and *Woodcock* v. *Hobbs* are to be treated as laying down some wide principle which would enable a deserted wife to defeat an action for possession brought against her by a purchaser of the premises, then we respectfully decline to follow them."[22]

An added ground for holding against the wife was that the premises in question were subject to the land registration system, it being held that, where the husband was the registered proprietor, a deserted wife could not, merely as such, set up a claim to an unregistrable proprietary interest so as to defeat the right of the registered proprietor to dispose of the land for which he held a clean certificate of title. Such a clog on the husband's title would be contrary to the spirit of the legislation.[23] This viewpoint, which has

[20] [1955] 1 All E.R. 445.

[21] See *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7, 18, *per* Upjohn J.; *Shakespear* v. *Atkinson* [1955] N.Z.L.R. 1011 (disapproved in *Dickson* v. *McWhinnie*, *supra*); *cf. Cochrane* v. *Kneebone* [1957] N.Z.L.R. 456.

[22] *Dickson* v. *McWhinnie*, *supra*, at p. 197.

[23] This matter was not adverted to in *Brennan* v. *Thomas*, *supra*, despite the title being a registered one, but was considered in *Maio* v. *Piro*, *supra*, Ligertwood

solid statutory justification, must appeal to all interested in the simplification of title, and is of great importance in Australia, the birthplace of the Torrens System.

This latter ground would have been sufficient to defeat the wife, but it is just as well that the Full Court of N.S.W. has taken a definite stand on the wider issue. The court pointed out the desirability of uniformity of decisions by English and Australian courts on matters of general principle. It would not lightly depart from a view of the law which it thought had become firmly established in England. The decisions from which it was sought to extract the principle in question were not, however, decisions of the House of Lords or of the Privy Council. Accordingly they did not bind the court. That is, of course, the crux of the matter. But it is not the whole story. The dramatic boom in the doctrine, in so far as it affects third parties, has been most unwelcome in Australia, and some courts have had the courage to depart from the English decisions in their least acceptable trends. It is felt to be an unnecessary intrusion into the sphere of property law, and it is not difficult to forecast how the High Court of Australia will react to it.

H. TARLO.*

J.'s reasoning being adopted in *Dickson* v. *McWhinnie*, *supra*. Generally, the Australian Acts do not contain as wide a provision as s. 70 (1) (*g*) of the Land Registration Act, 1925 (Eng.) (protecting the rights of persons in actual occupation).

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A NOTE ON SECTION 14 (1) AND (2) OF THE SALE OF GOODS ACT, 1893

THE purpose of this note is to examine the present effect of these two subsections in the light of subsequent judicial interpretation, and to suggest a revised version of them which would be more in line with modern doctrine.

Section 14 runs as follows:

> "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—
>
> "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
>
> "(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

I shall be mainly concerned in what follows with subsection (1), and for the time being we can leave subsection (2) on one side. Similarly, I am leaving out of account for the moment the proviso to subsection (1). What we have left of subsection (1) is, apart from two expressions, delightfully clear and has given rise to no difficulty whatsoever.

The two expressions to which I refer are these: first, "particular purpose," and secondly, "so as to show that the buyer relies on the seller's skill or judgment." As to the first, it is now well settled that a purpose may be a "particular purpose" within the meaning of this subsection even though it is the normal purpose for which the article sold is used, and that the act of ordering goods whose purpose is evident from their name "makes known" to the seller

the purpose for which they are required. That an ordinary or normal purpose was not within the words of the Act was strenuously argued on behalf of the defendant in *Preist* v. *Last*.[1] This argument was rejected by the Court of Appeal. It does not follow, however, that a normal and a special purpose are one and the same thing in regard to the application of section 14 (1). I shall return to this point in a moment.

The words " so as to show that the buyer relies on the seller's skill or judgment " are not so easily disposed of. It seems to be fairly well established that in the case of goods whose purpose is self-evident, the fact that the purpose is self-evident not merely " makes known " to the seller the purpose for which they are required—in the absence, of course, of a disclosure by the buyer that he requires them for some purpose other than their normal one—but is also sufficient to prove the necessary reliance on the seller's skill or judgment. Collins M.R. in *Chapronière* v. *Mason*[2] is reported as follows: (His Lordship said that) " It was obvious that the person who bought a bun from a baker relied on the baker's skill or judgment." The judgment in this case was not, however, based on section 14 (1). For this reason the advice of the Privy Council in *Grant* v. *Australian Knitting Mills*[3] is probably stronger authority. The plaintiff in that case had done no more than buy some underpants. He had not, so far as one can tell, asked the shop assistant whether the garments which he was shown would be fit for the purpose for which he required them, nor brought home to the assistant in any way that he (the plaintiff) was relying on the latter's skill or judgment. Yet he recovered damages under section 14 (1). Lord Wright said[4]:

> " The first exception,[5] if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller, ' so as to show that the buyer relies on the seller's skill or judgment.' It is clear that the reliance must be brought home to the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to a shop in the confidence that the tradesman has selected his stock with skill and judgment." [6]

So much for goods whose purpose is self-evident. The statute has been judicially glossed in such a way as to relieve a plaintiff

[1] [1903] 2 K.B. 148. The hot water bottle case.
[2] (1905) 21 T.L.R. 633, at 634.
[3] [1936] A.C. 85
[4] *Ibid.*, at 99.
[5] *i.e.*, Sale of Goods Act, s. 14 (1), or rather, the equivalent subsection of the South Australian Sale of Goods Act, 1895.
[6] See also *Frost* v. *Aylesbury Dairy Co.* [1905] 1 K.B. 608 (sale of milk contaminated with typhoid germs) where the vendors' insistence on the precautions they took to ensure the purity of the milk was held to show reliance by the buyer on the vendors' skill and judgment.

of any burden of proving that he brought home to the seller that he was relying on the latter's skill or judgment. But what of the case where the buyer requires the goods for a purpose which he discloses expressly to the seller, and where this purpose is not self-evident from the nature of the goods? Let us take the case of *Manchester Lines* v. *Rea*.[7]

The plaintiffs, who were shipowners, ordered a quantity of coal for their steamship "M" from the defendants. The defendants knew the purpose for which the coal was required. Owing to a combination of circumstances beyond the control of the defendants, there was only one source of supply from which they could obtain the quantity which the plaintiffs required. They delivered coal from this source, and it proved wholly unsuitable for the plaintiffs' ship, with the result that the ship had to turn back after putting out to sea. The House of Lords held that section 14 (1) applied.

Lord Buckmaster said[8]:

> "If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment."

Lord Atkinson speaks to the same effect[9]:

> "It was argued that this subsection throws upon the buyer the burden of showing not only that he has made known to the seller—expressly or by implication—the particular purpose for which the goods are required, but also that he relied upon the 'skill and judgment of the seller' in selecting the goods to be supplied. Three questions arise upon this contention: (1) Does not the buyer by (as in the present case) expressly stating in the contract of purchase the purpose for which he requires the goods, prima facie at least, show to a seller whose business it is to supply goods of the description required, that he relies upon the latter's skill and judgment sufficiently to satisfy the provisions of this subsection?"

This question he answers in the affirmative.

Lord Sumner[10] is less explicit.

> "The words of section 14 (1) are 'so as to show,' not 'and also shows.' They are satisfied, if the reliance is a matter of reasonable inference to the seller and to the court."

He differs from the other learned Lords in not stressing that a strong inference is to be drawn from the mere fact that the seller has contracted to supply goods, knowing the purpose for which those

[7] [1922] 2 A.C. 74.
[8] *Ibid.*, at 79.
[9] *Ibid.*, at 84–86.
[10] *Ibid.*, at 90.

goods are to be used. In fact, I think it is not going too far to say that the effect of the opinions of Lords Buckmaster, Atkinson and Dunedin (to be considered in a moment) is that the inference of reliance will ordinarily be drawn on the strength of a contract made with knowledge on the part of the seller of the purpose for which the goods are required.

This becomes apparent when we consider in what circumstances reliance on the seller's skill or judgment will *not* be shown. Lord Dunedin,[11] after stating that disclosure of the purpose for which the goods are required will satisfy the provisions of the subsection, unless there are other circumstances to prevent the drawing of the ordinary inference, goes on to consider what these circumstances might be:

> " For instance, if there had been a conversation in which the seller had said: ' I have only got such and such Welsh coal and I cannot guarantee it to be fit for bunkering for steamer, but I think it may do; you can have it if you like,' and if, on the top of that, the contract had been made, then I think the ordinary inference of trust would have been displaced."

This example shows, I think, that in order to escape liability under section 14 (1) a seller must show that he contracted on the footing that the risk of the goods' proving unfit for the purpose for which they were required stood with the buyer, or in other words, that the seller was not going to make the decision on the fitness of the goods for the buyer. If the seller offers what goods he has, without a word as to their fitness, section 14 (1) applies. This was in fact exactly the situation of the respondents in *Manchester Lines* v. *Rea*. They delivered the only coal they could get without ever consulting with the buyers as to its probable fitness for their purpose.

If it is difficult for a seller who is not the manufacturer of the goods to escape liability under section 14 (1), it is probably even more difficult for a seller who *is* the manufacturer to do so. This will be evident upon examination of the case of *Cammell Laird & Co.* v. *The Manganese Bronze and Brass Co.*[12] The appellants, a firm of shipbuilders, had agreed to build for and sell to X Co. two ships. They made a contract with the respondents for the manufacture of two propellers, to be to the entire satisfaction of the future owners, X Co., and of the appellants. The respondents made two propellers in accordance with the specifications given. One of them, when fitted to one of the ships, made so much noise that X Co. would not accept it. A replace propeller was made, also in accordance with the specifications, and this again proved too noisy. A second replace propeller was made and this one was satisfactory. The propeller which had been fitted to the other ship was tried on the

[11] *Ibid.*, at 81.
[12] [1934] A.C. 402.

ship with which there had been so much trouble and was found entirely satisfactory. The appellants sued for damages for delay in completing the work, relying on the "entire satisfaction" clause and on section 14 (1) of the Sale of Goods Act. They were held by the House of Lords to be entitled to succeed on both grounds.

Lord Warrington of Clyffe's statement of the position under section 14 (1) is expressly based on *Manchester Lines* v. *Rea*. He says [13]:

> "The point in that case [*i.e.*, *Manchester Lines* v. *Rea*] was that reliance by the purchaser on the skill and judgment of the vendor may be inferred from the communication by the purchaser of the purpose for which the goods in question were purchased, and need not be supported by positive evidence, as the Court of Appeal in the judgment appealed from and reversed had thought."

When applying this to the facts of the case before him, he said [14]:

> "Here there was a substantial area outside the specification, which was not covered by its directions and was therefore necessarily left to the skill and judgment of the seller.[15] Without attempting to express an opinion on the actual cause of the trouble, I think it is clear that it arose from some defect in the seller's area. Four propellers were made, *each in accordance with the specification*. Two were noisy, two were not."

It will be very rarely that a manufacturer is required to produce an object *for a special purpose* upon specifications so complete that there is no room for the exercise of his skill or judgment at all. Of course, it is implicit in the decision in the *Cammell Laird* case that the defect rendering the goods unfit for their special purpose must arise from the area left to the seller's judgment.[16]

When we come to consider Lord Wright's judgment in the *Cammell Laird* case, we find that the law is stated with a rather different emphasis.

> "But the more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the seller's skill and judgment. *Such a reliance must be affirmatively shown*; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on

[13] *Ibid.*, at 413.

[14] *Ibid.*, at 414. Italics supplied.

[15] In particular, the thickness of the propeller blades was not specified, apart from the thickness along medial lines, and apart from the direction that the edges were to be "brought up to fine lines." It was subsequently found that the satisfactory propellers had slightly thicker blades in some respects. They were also somewhat heavier. *Cf.* Lord Tomlin, *ibid.*, at 411.

[16] The problem of "partial" reliance, *i.e.*, reliance in respect of some matters, but not in respect of others, will normally only arise in the case of a seller who is also manufacturer.

that footing. *The reliance is to be the basis of a contractual obligation.*"

Yet he accepts *Preist* v. *Last*.

> " In some cases the matter may be very simple: the purpose for which a hot water bottle is required is easily determined and equally easy is it to determine the extent of reliance on the seller.[17]

Lord Wright's formulation of the requirements of section 14 (1), with its insistence on affirmative proof of the buyer's reliance on the seller's skill or judgment, is, in my opinion, contrary to the general tenor of the decisions, and in particular, is contrary to the formulation on which the decision of the House of Lords in *Manchester Lines* v. *Rea* [18] is based. It is indeed to be noticed that Lord Wright does not allow the heresy which has tainted his statement of the principle to affect his decision in the case. Nor does it affect the way in which he reaches that decision.

> ". . . what the respondents had to do was to follow the instructions given them as to design and so forth, and produce something which being of that design and size would function as a propeller. The conclusion I arrive at is that in all matters relevant as between these parties to the creation of a propeller for No. 972, there was reliance on the seller's skill or judgment within the section." [19]

This is based on inference and not on affirmative proof.

But the fact remains that it is misleading to talk in terms of affirmative proof of reliance by the buyer on the seller's skill or judgment. A good example of this is provided by the statement of the effect of section 14 (1) in Cheshire and Fifoot [20]:

> " It must be proved that the seller knew, not only the purpose for which the goods were required, but also that reliance was placed on his own skill and judgment. . . . It is a question of fact in each case whether the seller as a reasonable man must have known that reliance was placed on his skill or judgment, *but he is taken to have this knowledge if a disclosure is made of the special purpose for which the goods are required.*"

Thus, what is given with one hand in the first sentence is taken away with the other hand in the second. There is no need to clutter up the law with doctrines of imputed knowledge which a more realistic statement of the fundamental principles would avoid.

Before putting forward my own suggestions for the improvement of the drafting of section 14 (1), I must say a word or two about the proviso. This states in quite unambiguous language that in the case of a contract for the sale of a specified article under its patent or other

[17] *Ibid.*, at 423–424. Italics supplied.
[18] [1922] 2 A.C. 74.
[19] [1934] A.C. 402, at 425.
[20] *Law of Contract*, 4th ed., at p. 131. Italics supplied.

trade name, there is no implied condition as to its fitness for any particular purpose. On the face of it there is no room for argument that the buyer has relied on the seller's skill or judgment: if the article is sold under its trade name section 14 (1) does not apply. But once again the courts have interpreted the statute.

The proviso must now be read in the light of the Court of Appeal's decision in *Baldry* v. *Marshall.*[21] The plaintiff in that case wrote to the defendants, asking them whether the Bugatti eight cylinder was likely to be on the market that year. The defendants replied that they specialised in the sale of these cars and could supply all the necessary information. At a subsequent interview the plaintiff told them of the purpose for which he wanted the car. They said that they thought that a Bugatti would satisfy his requirements, and the plaintiff ordered one. Having found the car unsuitable, he claimed to reject it and have the purchase money back.

The defendants argued that where there was a sale under a trade name the question of reliance on the seller's skill or judgment was irrelevant. They found strong support for this proposition in a dictum of Farwell L.J. in *Bristol Tramways* v. *Fiat Motors*[22]:

> "If a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he told the vendor before he ordered it the purpose for which he required it."

And again:

> ". . . the seller is not bound to refrain from carrying out his order for the machine because it is ill adapted for, or even wholly incapable of, effecting the purpose mentioned in the order."

One could not desire a clearer statement of the effect of the proviso. Moreover, this is the natural meaning of the language used in the statute.

Nevertheless, the plaintiff succeeded in *Baldry* v. *Marshall.* The crucial issue was whether the car had been *sold under its trade name* within the meaning of the proviso. The effect of the decision is that an article is *not* "sold under its trade name" when the buyer has relied on the seller's skill or judgment that the article will be fit for the purpose for which he (the buyer) requires it. The following well-known passage from the judgment of Bankes L.J.[23] illustrates his line of reasoning:

> "The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances. I may illustrate my meaning by reference to three different cases. First, where a buyer asks a seller for an

[21] [1925] 1 K.B. 260.
[22] [1910] 2 K.B. 831, at 839.
[23] [1925] 1 K.B. 260. at 266.

> article which will fulfil some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name, there I think it is clear that the proviso does not apply. Secondly, where the buyer says to the seller, ' I have been recommended such and such an article '—mentioning it by its trade name—' will it suit my particular purpose? ' naming the purpose, and thereupon the seller sells it without more, there again I think the proviso has no application. But there is a third case where the buyer says to the seller, ' I have been recommended so and so '—giving its trade name—' as suitable for the particular purpose for which I want it. Please sell it to me.' In that case I think it is equally clear that the proviso would apply."

In fact he makes no bones about reintroducing the test of reliance in so many words.[24] The test is:

> " Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be? "

The effect of the decision in *Baldry* v. *Marshall* is that where the buyer discloses the purpose for which he requires the goods the seller will be hard put to it to resist the inference of reliance on his skill or judgment, and the proviso will not apply. Yet on the wording of the proviso as it stands it is by no means obvious that reliance on the seller is to have any relevance at all where an article is sold under a patent or other trade name.

But it seems that the proviso is not deprived of its full effect in the case of goods sold for a purpose which is self-evident. As we have seen,[25] the fact that the purpose is self-evident is sufficient to show reliance on the seller's skill where the goods are *not* sold under a trade name. But in *Wilson* v. *Rickett Cockerell & Co., Ltd.*[26] Romer L.J. said that the fact that the buyer was satisfied with the standing and reputation of the sellers, and assumed that any Coalite supplied by them would be of the normal quality and in normally good condition, although indicating some reliance on the sellers' skill and judgment, was quite insufficient to displace the operation of the proviso.[27] Consequently there will be cases where the buyer is defeated on the sole ground that the goods were sold under a trade name. But they will be pretty rare.

One of the main defects of section 14 (1) is that it lumps together the two cases, where goods are required for their ordinary purpose and where goods are ordered for a special purpose. It is no accident that in the first case section 14 (2) often applies as well as section

[24] *Ibid.*, at 267.
[25] *Supra*, 485.
[26] [1954] 1 Q.B. 598, at 612.
[27] Contrast with this the language of Lord Wright in *Grant* v. *Australian Knitting Mills*, quoted above: " [In the case] of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to a shop in the confidence that the tradesman has selected his stock with skill and judgment."

14 (1).[28] This is because the implied condition is basically one of quality, and there is no justification for retaining the inappropriate language on which this result is based under section 14 (1). If it is recognised that the condition is one that the goods shall be of reasonably good quality, or rather of a quality which the buyer is entitled in the circumstances to expect,[29] not only can we dispense with the artificialities of "inferred reliance" but we can also see that the proviso to section 14 (1) has, in this first case at least, no justification in principle. For if a retailer is to be bound by an implied condition that the goods which he sells are of reasonably good quality, as indeed he ought to be,[30] then no sensible distinction can be made between goods which are sold under a trade name and goods which are not.

The implied condition that the goods sold are fit for a particular purpose should be confined to the case where the buyer has expressly indicated some special purpose for which he requires them. In this case it should be recognised in the wording of the statute that reliance on the seller's skill or judgment is not something which the buyer has to prove, but, in the absence of some strong indication to the contrary, is an inference which is to be drawn in every case. Here again there is no justification for an exception in cases where an article is sold under a trade name. *Baldry* v. *Marshall* is sound in general principle, and effect should be given to it in reframing the section.

It has already been pointed out that in the case of goods which have a self-evident purpose section 14 (1) and section 14 (2) may easily overlap. It is impossible to be absolutely certain of the precise meaning of "merchantable," but the general idea is that the goods should be of a quality which the buyer is entitled to expect for his money. The limitation of the proviso to section 14 (2) to cases where the buyer has *actually* examined the goods seems a little odd. There is no good reason why a buyer who has neglected to examine them when he had a real opportunity to do so, and a reasonable buyer would have taken the opportunity, should be able to call on the seller to make good defects which an examination ought to have revealed. Yet as the law stands he can. In *Thornett & Fehr* v. *Beers & Son* [31] Bray J. held that the Act had deliberately changed the common law rule, and a mere opportunity for examination no longer excluded the implied condition.[32] Nevertheless, the examination need not be

[28] As in, for example, *Grant* v. *Australian Knitting Mills*.

[29] Obviously the buyer of a cheap article cannot complain if it is not as well made as an expensive article of the same kind. For this reason it seems impossible, or at least misleading, to talk of a condition of "good quality," or even "reasonably good quality."

[30] If only for the reason that the buyer is not in contractual relations with the manufacturer.

[31] [1919] 1 K.B. 486.

[32] It is not contended that mere opportunity for examination ought to exclude the implied condition. A buyer ought only to be defeated under the proviso where it was reasonable to expect him to take the opportunity of examining the goods. This will obviously not be so in every case.

as thorough as a prudent buyer would make, provided that the buyer concerned considered it sufficient. This only serves to emphasise the absurdity of allowing a buyer to rely on section 14 (2) when he has neglected altogether to examine the goods.[33] Moreover, why should examination exclude the seller's liability (as to defects which the examination ought to have revealed) under section 14 (2) but not under section 14 (1)? [34]

My contention has been that as a result of judicial interpretation section 14 (1) and (2) now have effects which, in some respects, no longer correspond with their language. The points which have been advanced in support of this contention, together with some suggested changes in the substantive law, may be summarised as follows:

First, two different situations have been brought within the scope of section 14 (1) which can be more conveniently handled separately—namely, the case where goods are bought for a purpose which is self-evident, and the case where goods are bought expressly for a special purpose. In the former case the implied condition is one of quality, and there is no need to frame it as one of fitness for purpose.

Secondly, the words " so as to show that the buyer relies on the seller's skill or judgment " are misleading in that unless the seller expressly guards himself against warranting that the goods will be fit for the purpose for which the buyer requires them, the mere fact of his supplying goods with knowledge of the buyer's purpose will be sufficient to raise the implied condition. There is no burden on the buyer other than that of showing that the seller knew of the purpose.

Thirdly, the decision in *Baldry* v. *Marshall* [35] renders the proviso to section 14 (1) nugatory, or nearly so, in regard to goods bought for a particular purpose, and it ought not to be retained either in this case or in the case of goods bought for a self-evident purpose.

Fourthly, the implied condition under section 14 (2) that the goods shall be of merchantable quality comes to much the same thing as the condition of quality which section 14 (1) gives in the case of goods bought for a self-evident purpose, and no harm would be done if these two implied conditions were rolled into one. This composite subsection ought to contain the proviso from section 14 (2), and the proviso ought, in turn, to be amended so as to exclude the implied condition where the buyer has had an opportunity, which he ought reasonably to have taken, of examining the goods, and has not bothered to do so.

[33] Again provided it was reasonable to expect him to examine the goods.

[34] This is assuming that both conditions are in effect as to quality (leaving aside the case under s. 14 (1) of goods required for a *special* purpose), and also that the limitation of s. 14 (2) to sales by description is not of great practical importance. See Atiyah, *Sale of Goods*, pp. 67–68. In any case it is hard to see a distinction of principle between a sale by description and a sale not by description.

[35] [1925] 1 K.B. 260.

There only remains the problem of redrafting the two subsections so as to give effect to these suggestions. The following version is tentatively proposed:

> " (1) Where the goods are of a description which is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality [36]; provided that if the buyer has, or ought to have, examined the goods there shall be no implied condition as to defects of quality which such examination ought to have revealed;
>
> " (2) Where goods are bought from a seller who deals in goods of that description (whether he be the manufacturer or not), and the buyer makes known to the seller the particular purpose for which he requires the goods, there is an implied condition that the goods shall be reasonably fit for that purpose."

If section 14 were revised on these lines the change would be mainly one of formulation. The following points, however, would be new: the implied condition of quality, which is at present excluded only in sales *by description* where the buyer has *actually* examined the goods, would be excluded in all sales where the buyer has had an opportunity, which he ought reasonably to have taken, of examining the goods, whether he has actually done so or not [37]; and the proviso to the present section 14 (1) would be entirely removed—it should be up to the seller to exclude the condition as to fitness for purpose by an express term of the contract if he does not want to guarantee their fitness for the buyer's purpose, and there is no reason in principle why a seller should not be liable on a condition of *quality* in the case of goods sold for a self-evident purpose, whether they are sold under a trade name or not.

Apart from these two points, I suggest that the law already has the effect which my revised form of section 14 (1) and (2) would give, and that it should be formulated in terms which correspond better with that effect.[38]

A. D. Hughes.*

[36] See note 29, *supra*. " Merchantable " may not be an ideal term, but it is difficult to find a better one.

[37] Liability is, and would be excluded only as to defects which an examination ought to have revealed.

[38] I would like to record my gratitude to Mr. J. W. Davies, B.C.L.(Oxon.), LL.B.(Birm.), Stallybrass Lecturer in Law at Brasenose College, Oxford, for his acute criticisms of this note

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THE DISTINGUISHING MARK OF CRIME

THE pursuit of definitions has never appealed much to lawyers because they are aware that the concepts they employ have been rough-hewn by history and stoutly resist philosophical formulation. An exception to the general rule has been the quest for a definition of crime, which has been undertaken with much learning and great ingenuity only to lead to a thoroughly disappointing anti-climax. The relegation of Kenny's celebrated discussion of the problem to an appendix of his *Outlines of Criminal Law* (only to be omitted altogether in the latest edition) leaves a student brought up on that work with the feeling that he has watched the rocket go up—and come down; but before this sense of deflation is accepted it may be profitable to consider how nearly right the proposed solution was and to isolate the informing insight that gave it such a long and honourable life. To do this, it is necessary to go behind Kenny to his source, John Austin.

Austin thought that the characteristic mark of a crime was that *its sanction is enforced at the discretion of the Sovereign.* Kenny found it necessary to add that the sanction in the case of a crime is punitive, but this addition was made simply to take account of the apparently anomalous case of the enforcement of the civil rights of the Crown which cannot be said to carry any criminal implication merely because the enforcement lies in the discretion of the Crown. While accepting Austin's definition, he re-cast it in a form that made Austin's exegesis of his statement explicit by referring expressly to the power of the Sovereign to remit the sanction. The only other modification he found himself obliged to make resulted from the fact that there are two particular crimes that the Crown has no power to remit, namely, sending a prisoner out of England to evade the protection of a writ of *habeas corpus*, and the commission of a common nuisance so long as the nuisance remains unabated. The resultant definition ran as follows: *crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all.* This somewhat complex statement remains, however, only an elaboration of the Austinian formula, which had the merit of a greater simplicity.

What remains puzzling is why Austin should have fastened upon a mark of criminal procedure that is wholly exceptional rather than upon one that is normal. It is clear that the object of prosecuting a man is not to let him off, but to ensure that what society thinks ought to be done is in fact done; and to suggest that the power to pardon constitutes the distinguishing mark of a crime leads one to suspect that the cart has, somehow, been put before the horse. This alone

might well have thrown doubt upon the validity of the definition and, when it was observed that the abrogation of the prerogative of mercy would, according to this definition, mean the abolition of crime itself, the absurdity became patent. Matters were in no way helped by Kenny's additions, for the introduction of the punitive factor, which appeared so reasonable in his day, became an incumbrance rather than an aid in view of the growing belief (be it right or wrong) that social aid and medical treatment may sometimes be a better response to crime than punishment. It remains true, however, that in practice remissibility is a remarkably reliable test of the criminal character of a wrong, and the collapse of the Austinian definition, as amended by Kenny, does not preclude an inquiry into the reason why it was such a near miss, particularly as a near miss is apt to show approximately where the target is.

The prerogative of mercy is necessitated by the fact that a constitutional duty lies upon the Crown to ensure that, in the case of a crime, the judgment of the court is put into effect. This may not be a logical necessity, but it is difficult to conceive of any reasonable constitutional system laying so absolute a duty of enforcement upon the Sovereign without making provision for the exceptional case in which the execution of the sentence would run counter to common sense or to an overwhelming social sentiment of justice. The substantial factor in this situation is found in the peculiarly heavy duty imposed upon the Crown to enforce the judgment of the court; the prerogative of mercy is purely ancillary and accidental. If Austin had pointed to the duty as the decisive mark instead of the power to remit, the history of the controversy might have been very different. It appears to be true without exception that *crimes are wrongs in respect of which the execution of the court's judgment thereon is undertaken* (*subject to any exercise of the Crown's power to remit*) *without the Crown being moved thereto or deflected therefrom by any other party*. This, it would seem, is never true of a civil wrong for, here, the judgment of the court is terminal in the sense that nothing happens unless the complaining party initiates some ancillary process to move the court to execution, for example, by judgment summons or writ of fieri facias. If Austin had based his definition upon this principle, Kenny's modifications would have been neither necessary nor appropriate. The punitive element, introduced to cover the enforcement by the Crown of its civil rights, is not required because, when the Crown has obtained its judgment, it must return to the court to initiate the process of enforcement exactly in the same way as any private litigant must do. The words, "if remissible at all," are clearly unnecessary.

The isolation of the factor of remissibility was, none the less, a master-stroke because it focused attention unerringly upon the critical stage in the procedure at which the unique and invariable distinction is to be located, namely, the point of execution. It is,

after all, not so grievous an error if, when looking for a needle in a hay-stack, someone points to the shadow it casts. When the mistake is observed, the needle is readily found.

It may be useful by way of further confirmation to play the fashionable and illuminating game of seeing what happens if we alter the procedural factor in question in respect of particular cases. For example, if a bastardy order were to be enforced automatically, even if the mother of the child took no step to have it enforced and even in despite of her wishes, who could doubt that bastardy would be transferred into the field of crime? The finding would become a conviction and the order would bear the mark of a sentence. Similarly, if damages awarded in a running down action were recovered from the defendant by officers of the Crown, whether or not the plaintiff took the initiative and even if he preferred not to enforce the judgment, the action would be transformed into a prosecution and, even if the damages were paid over to the plaintiff by way of redress, this would not suffice to rob it of its criminal character. If, conversely, the sentence pronounced upon a murderer were to lead to no action at all unless the next-of-kin chose to initiate the execution of the sentence by some ancillary process, it would be impossible to regard murder as a crime at law; it would become a mere civil wrong.

The anomalous cases that have proved so troublesome in relation to other modes of definition lose their anomalous character when subjected to the test proposed. The common informer, now happily defunct, could not wait for the court to enforce the penalty awarded, but was obliged to take the necessary steps to procure enforcement in the ordinary way, and the action was, thus, decisively marked as civil. Contempts of court, likewise, are neatly distinguished as criminal or civil according to whether the sanction follows automatically or in consequence of some precipitating process invoked by an interested party. The case of the enforcement of the civil rights of the Crown has already been noticed, and clearly offers no exception to the rule.

This unique distinguishing mark ought not, however, to be regarded as a definition. It is simply the inevitable consequence of an assumption by society of a particular responsibility in the face of certain wrongs; nor is it the only consequence. To fulfil its self-imposed duty effectively, special measures for detecting these wrongs may be expected and, also, special powers for bringing suspected offenders before the court. Nor are we surprised to find other consequential differences in the mode of trial and the rules of evidence, nor to observe that prosecutors must have the consent of the court to withdraw a charge. These marks are interesting and informative *indicia*, pointing to the governing factor of special social responsibility in respect of these wrongs; but they are not crucial. This follows logically enough from the fact that the object of criminal procedure is not to catch criminals, nor to bring them

to court, nor yet to declare publicly after fair trial what ought to be done with them: the object is to do what ought to be done and to ensure that no one stands in the way of the fulfilment of this duty. Clearly, this duty will go unfulfilled if offenders are not detected, not brought to trial, and their guilt not established; but these stages are ancillary to the factor of execution. If execution is omitted, the prior stages lose all meaning; if execution is introduced, these inevitably make their appearance in some form or other. Thus, in practice, we may look to the whole procedure to see whether it reflects the particular responsibility undertaken by society in relation to such wrongs if we wish to know whether a particular wrong is a crime or not; but the decisive mark remains the automatic character of execution.

This approach to the matter is satisfying because we should expect any advanced society to make a distinction between occasions that lead it merely to offer its judicial and executive facilities to the wronged citizen and occasions that lead it to take matters into its own hands; and this, as Kenny himself made clear, is the informing principle that produces the divergent forms of procedure and stamps the wrong in question as either civil or criminal. Moreover, this approach implicitly, but clearly, leaves open the quite different problem as to why society chooses to treat any particular wrong as a crime rather than a mere civil wrong. This important question lies outside the scope of the present comment, but it may at least be suggested that the answer is to be found, not in terms of a definition, but in the realm of convention. A wrong becomes a crime because we choose to make it so; and, if we wish to know why we so choose, we can but search our hearts and observe how men, at various stages of civilisation, think and behave when frustrated by their neighbours.

What emerges from this brief reconsideration of the matter is that Austin was so nearly right that he ought not to be deprived of the honour due to his masterly insight merely because he was diverted from the substantial factor to its intimately connected shadow. Admittedly, his mistake led Kenny to gild the wrong lily; but Kenny's clear and comprehensive discussion of the problem is rightly regarded as a legal classic and is worthy of preservation despite the reverse it inevitably, though belatedly, suffered at the hands of a logical generation. He saw, and emphasised, the all-important point that it is society's responsibility for, and control over, the sanction that affords the true basis for the distinctive character of a crime at law; and in this he was right.

It would be a misfortune if so much labour and such skill were to be thrown away. Both Austin and Kenny penetrated to the root of the matter and, in an age in which the creation of crimes has become a legislative sport, it is satisfactory to know precisely how this is done, because this reveals, no less, the means by which

crimes can be converted back into civil wrongs—a matter that may seem more urgent when the present process of diluting the concept of crime has run its full course. That, however, is another story, and the present writer has already commented upon it elsewhere.[1]

Seton Pollock.*

[1] See "What's in a Name?" [1956] Crim.L.R. at p. 792.

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STATUTES

The Adoption Act, 1958

April 1959 may be said to mark the full maturity of legal adoption in the United Kingdom as October 1950 [1] celebrated its majority.[2]

Technically the Adoption Act, 1958,[3] is a consolidating statute, but such a description may be misleading as, although it consolidates with the previous law Part II of the Children Act, 1958,[4] the Children Act, 1958, and the Adoption Act, 1958, both came into operation on April 1, 1959; Part II of the Children Act, 1958, therefore never achieved independent operation. The opportunity has been taken to sweep clean from April last the whole of the adoption law; new Rules came into effect in England on April 1,[5] replacing those which, in the county court and juvenile court, had remained in operation since before 1950; new Regulations [6] came into operation on April 17. The majority of the amendments made by the Act and other instruments result from the recommendations made in 1954 by the Hurst Committee,[7] but some of the Committee's recommendations have not been implemented, and a few independent changes have been made.

Consents to adoption

Some outstanding amendments concern the consents required before children [8] may be adopted. The Adoption Act, 1958, s. 4, which enumerates the persons whose consent is required, no longer includes any person liable by virtue of an order or agreement to contribute to the child's maintenance. In practice this has generally

[1] The Adoption Act, 1950, came into operation on October 1, 1950.

[2] In England and Wales, legal adoption was recognised from January 1, 1927, under the Adoption of Children Act, 1926; in Scotland from January 1, 1931, under the Adoption of Children (Scotland) Act, 1930.

[3] 7 Eliz. 2, c. 5.

[4] 6 & 7 Eliz. 2, c. 65.

[5] S.I. 1959, No. 479 (High Court) replacing S.I. 1950, Nos. 80 and 282; No. 480 (County Court) replacing S.I. 1949, No. 2397 and 1952, No. 1258; No. 504 (Juvenile Court) replacing S.I. 1949, No. 2397 and 1952, No. 554.

[6] S.I. 1959, No. 639.

[7] The Departmental Committee on the Adoption of Children appointed on January 26, 1953, under the chairmanship of Sir Gerald Hurst, Q.C., T.D., whose report, Cmd. 9248, was presented to Parliament in September 1954. This will be referred to as "the Committee."

[8] Only an unmarried infant may be adopted in Great Britain. The Act and statutory instruments generally refer to the adopted person as "the infant," but sometimes, *e.g.*, s. 28 (2), s. 37 (1), the words "child" or "children" are used. Since before adoption the infant is frequently "a protected child" (s. 37) and thereafter his relationship to the adopter is "as if the infant were a child born to the adopter in lawful wedlock" (s. 13 (1)), there is perhaps some statutory justification, albeit flimsy, for the use of the word "child" instead of "infant" throughout this note.

meant the putative father of an illegitimate child against whom an affiliation order had been obtained, or who had contracted an enforceable liability to contribute to the child's maintenance. If he had so contributed voluntarily, his consent to the child's adoption was not required under the Act of 1950.[9] The 1958 Act also makes it quite clear that the consent of a fit person, or manager of an approved school, into whose care a child has been committed, or a local authority which has assumed parental control over the child under the Children Act, 1948, s. 2, is not necessary.[10] All such persons are, however, under the Rules,[11] made respondents to the adoption application, of which they are given notice. In general, the forms to be completed by persons consenting to the adoption,[12] and the explanatory memorandum supplied to them under the Regulations,[13] appear rather less forbidding than formerly. No provision is made, as was recommended,[14] that the next-of-kin of a child's deceased parent should always be informed of an adoption application in regard to the child, but among the duties of the guardian *ad litem* is that of informing the court, where either parent of the child is dead, if he learns of any relation of the deceased parent who wishes to be heard on the question whether an adoption order should be made.[15] The completion of an admissible document signifying consent is facilitated by the provision [16] that it may be attested by a county court officer or justices' clerk (in Scotland the sheriff), as well as a justice of the peace, who need not be a member of the Juvenile Panel. There is no requirement that the form must be read and explained to the mother before she signs it, as was recommended. Provisions for attestation of documents executed outside the United Kingdom are laid down in the Rules.[17]

More drastic amendments have been made as regards the circumstances in which the consent normally required may be dispensed with, *viz.*, if the person whose consent is required has persistently failed, without reasonable cause, to discharge the

[9] See *Re M., An Infant* [1955] 2 Q.B. 479, C.A., and *Re D., An Infant* [1958] 1 W.L.R. 197; [1958] 1 All E.R. 427, C.A., commented on in (1958) 21 M.L.R. 413.

[10] s. 4 (3), and see Cmd. 9248, para. 110.

[11] S.I. 1959, No. 479, r. 16 and Form 8; No. 480, r. 10 and Form 2; No. 504, r. 12 and Form 6. S.I. No. 639, reg. 5 and the 4th Schedule, para. 10 require the placing authority to ascertain, before an illegitimate child is placed for adoption whether the father (if known) has any objection to the child's adoption.

[12] S.I. 1959, No. 479, r. 8 and Form 4; No. 480, r. 5 and Form 5; No. 504, r. 5 and Form 4.

[13] S.I. 1959, No. 639, reg. 4 and Third Schedule.

[14] Cmd. 9248, para. 112.

[15] S.I. 1959, Nos. 479, 480 and 504, Second Schedule, para. 8. The rules also provide (see note 11 *supra*) that notice of an adoption application should be served on any other person or body who in the opinion of the court ought to be served with it.

[16] s. 6 (3); *cf.* Cmd. 9248, paras. 97–99.

[17] S.I. 1959, No. 479, r. 8 (2); No. 480, r. 5 (2); No. 504, r. 5 (2).

obligations of a parent or guardian of the child.[18] It will be interesting to see how far the courts will modify, in the light of this provision, their previous attitude that, in considering whether the consent of a parent to the child's adoption was unreasonably withheld,[19] the primary consideration was not the welfare of the child, but the attitude of the parent as a parent, in refusing consent.[20]

Qualifications of adopters

One of the Committee's recommendations which has not been implemented was that the emphasis of the Act should be altered to show that normally adoption is by a married couple, and that references throughout the Act should be to the applicants and not the applicant for adoption.[21] The minimum age requirements of adopters have, however, been amended. No minimum age-gap between adopter and adopted appears in the new Act; nor is any minimum age specified for a parent who adopts his own child either alone or jointly with his spouse; a relative aged twenty-one may adopt alone, or jointly if his spouse is also not less than twenty-one; and a stranger of twenty-five may adopt alone, or jointly if his spouse is not less than twenty-one.[22] On the other hand, nothing has been done about a maximum age for adopters, or the adoption of children by their grandparents, which the Committee found so disturbingly widespread.[23] The recommendation[24] that the past tendency to pay more attention to the health of the child than to the health of the would-be adopters should be reversed has not been implemented, but some progress is evidenced by the provision in the new Act[25] that in considering an adoption application the court should have regard (amongst other things) to the health of the applicant. The Rules also lay down a form of medical certificate to be completed in regard to the prospective adopters of a child below school-leaving age,[26] the brevity and generality of which is still in startling contrast with the elaborately detailed report required[27] on the health of the child. Medical practitioners who

[18] s. 5 (2), and *cf.* Cmd. 9248, paras. 113–120.

[19] Unreasonable withholding of consent is still a ground for dispensing with it under s. 5 (1) (*b*), although Cmd. 9248, para. 120 recommended its deletion.

[20] See *Hitchcock* v. *W.B.* [1952] 2 Q.B. 561, D.C., *Re Kuzmiecz* [1953] 1 Q.B. 117, C.A., and *Watson* v. *Nikolaisen* [1955] 2 Q.B. 296, D.C., in which Lord Goddard, L.C.J. said that although the mother (whose sole contribution to the child's welfare had been the retention for her own purposes of the family allowance received for a child she did not support) would probably be considered unfit to have care and custody of the child, this did not affect her right to refuse consent to the adoption.

[21] Cmd. 9248, paras. 178–181.

[22] s. 2 (1) and (2); *cf.* Cmd. 9248, para. 149.

[23] Cmd. 9248, paras. 148 and 283.

[24] Cmd. 9248, paras. 140–141 and Appendix III.

[25] s. 7 (2).

[26] S.I. 1959, No. 479, r. 9 and Form 5; No. 480, r. 3 and Form 3; No. 504, r. 3 and Form 2.

[27] S.I. 1959, No. 479, r. 10 and Form 6; No. 480, r. 4 and Form 4; No. 504, r. 4 and Form 3; *cf.* Cmd. 9248, Appendix IV. No. 639, reg. 5 (*b*), and Fifth Schedule.

seek to remedy the neuroses or marital instability of their patients by arranging for them to adopt a child [28] would clearly have few qualms about certifying their suitability from a medical point of view, but of course if the requirements for legal adoption are made too stringent, *de facto* adoption will spread, and whoever gains by this, the child must always lose.

A major change is that providing [29] that an adoption order may be made in the High Court or the county court (in Scotland the Court of Session or the sheriff court) but not in the juvenile court, in favour of an applicant not ordinarily resident in Great Britain. There is also a completely new institution [30] called a provisional adoption order, which may also be made only by the High Court or county court (in Scotland the Court of Session or the sheriff court) in favour of an applicant not domiciled in Great Britain, if the court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled. It seems that mere *de facto* adoption abroad is contemplated, which may be very perilous.[31] For such a provisional order, six months' prior notice must be given, in place of the usual three months' notice, and the child must also have been in the care and possession of the applicant for six months, instead of three months, before the application is heard. Such a provisional order will give the applicant the custody of the child pending the adoption abroad, and authorise his removal from the jurisdiction, but it will not affect rights of succession, or give the child citizenship of the United Kingdom. Apart from such provisional adoption orders, there is a prohibition [32] on sending any child who is a British subject out of Great Britain to any place outside the British Islands [33] with a view to adoption abroad. As before the Act was passed, interim orders may be made for a maximum period of two years, but now,[34] where the original interim order is for a lesser period, it may be extended to a maximum of two years in all.

Other preliminary requirements

The Committee's recommendations [35] as to the period for which the applicants should have custody of the child, and the notice to be given of their intention to apply for an adoption order, have

28 See Cmd. 9248, para. 43, and the examples there quoted.
29 s. 12 (1), and *cf.* Cmd. 9248, paras. 163–174.
30 See s. 53.
31 The Regulations provide (S.I. 1959, No. 639, Fourth Schedule, Part II, para. 8) that before placing a child for provisional adoption the placing agency should ascertain whether the applicants intend to adopt the child in law *or in fact* in the country in which they are domiciled. Under the Rules, applicants for a provisional order must provide evidence of the adoption law in the country in which they are domiciled: S.I. 1959, No. 479, r. 12; No. 480, r. 17.
32 s. 52.
33 Defined as the United Kingdom, the Channel Islands and the Isle of Man.
34 s. 8 (4).
35 Cmd. 9248, paras. 66–68.

been partly implemented. The Act now provides,[36] as recommended, that no period of custody (which is unchanged at a minimum of three months before the adoption order may be made, or six months for a provisional order)[37] shall begin to run until the child is six weeks old, this being the earliest date on which the mother may consent to the child's adoption.[38] Three months' prior notice of the intention to apply for an order must still be given, but this is not necessary (a) where a parent is applying to adopt, and (b) where the child is, at the date of the hearing, above the school-leaving age. In case of a joint application for adoption by persons not ordinarily resident in Great Britain,[39] only one of the prospective adopters need give the requisite notice to the local authority in whose area he is living[40] and only one need have had the requisite care and possession of the child before the order may be made, provided that both applicants were living together in Great Britain for at least one of the three months. Nothing has been done to remedy the practice of lodging an application the day after receiving the child, which the Committee found had so little to recommend it,[41] nor is any minimum time limit fixed between the date of the application and that of the hearing, although the Rules provide[42] that the date of the hearing in the High Court shall not be fixed until the guardian *ad litem* presents his report.

One recommendation on which the Committee laid great stress and on which all the witnesses they heard were unanimous,[43] was the absolute necessity of bringing up an adopted child in the knowledge that he was adopted. The ludicrous coyness on this point of many otherwise sensible people has frequently had disastrous effects when the child discovers the truth, as he invariably will. It is deplorable that no mention of this important and very necessary recommendation appears in the new Act or any of the supporting statutory instruments; one can only hope that, in this direction at least, the tidy new adoption law will not long remain unamended.

Adoption agencies

One of the Committee's major recommendations was that it should be made clear that local authorities were empowered to

[36] s. 3 (1).
[37] s. 53 (5).
[38] s. 6 (2) (*a*).
[39] s. 12 (3).
[40] Fortunately there appears to be no concept of residence apart from ordinary residence.
[41] Cmd. 9248, paras. 148 and 283.
[42] S.I. 1959, No. 479, r. 15; see also Adoption Act, 1958, s. 9 (8). In the county court and juvenile court there is a different procedure, under which the court fixes a time for the hearing of the application when it appoints the guardian *ad litem*: S.I. 1959, No. 480, r. 10; No. 504, r. 10; *cf.* Cmd. 9248, para. 66.
[43] Cmd. 9248, paras. 22 and 150–154.

place for adoption children who were not in their care under the Children Act, 1948, and that for this purpose local authorities should be subject to regulations similar to those applying to adoption societies.[44] This recommendation is implemented by the provision[45] that any local authority[46] shall have power to make and participate in arrangements for the adoption of children. But the Regulations provide[47] that references to the case committee of an adoption society shall be construed as a reference to a local authority who so participates in placing a child. Under the Rules[48] the guardian *ad litem* in the county court and juvenile court is, if the local authority consents, to be the children's officer or assistant children's officer or a probation officer, unless the court considers it not reasonably practicable or undesirable in any particular case to make such an appointment. An exception is made, however, in the case of a member, officer, or servant of a local authority, adoption society, or other body of persons which has the rights and powers of a parent of the child or has taken part in the arrangements for the child's adoption; no such person may be appointed guardian *ad litem*. The Regulations lay down[49] that, after the premises where it is intended to place a child for adoption have been inspected by or on behalf of the case committee, the case committee shall inquire of the local authority for the area whether they consider that such a placing would be detrimental. These are wide new powers for local authorities, and it will be interesting to see how extensively, and with what effect, they are used. Another recommendation to which effect is given by the Regulations[50] is that all information obtained in the course of negotiations about placing a child for adoption are to be treated as confidential, that records and documents are to be preserved for at least twenty-five years and rendered inaccessible to unauthorised persons.[51] The case committee of adoption societies is, as previously,[52] to consist of three persons, but now each of them is to be competent to judge whether the proposed placing is likely to be in the interests of the child.[53] The forms of application for registration of adoption societies and of their annual returns[54] have been expanded, and now every society

[44] Cmd. 9248, paras. 24–26 and 274.
[45] s. 28.
[46] Defined for the purpose as, in England, the councils of counties and county boroughs and, in Scotland, the councils of counties and large burghs within the meaning of the Local Government (Scotland) Act, 1947.
[47] S.I. 1959, No. 639, reg. 9; *cf.* Cmd. 9248, para. 25.
[48] S.I. 1950, No. 480, r. 8 (2); No. 504, r. 8 (2). See also Adoption Act, 1958, s. 9 (8), and *cf.* Cmd. 9248, para. 73. In the High Court the guardian *ad litem* is always the Official Solicitor unless some special circumstances exist: S.I. 1950, No. 479, rr. 4 and 5.
[49] S.I. 1950, No. 639, reg. 5 (*e*); *cf.* Cmd. 9248, paras. 27 and 37.
[50] S.I. 1950, No. 639, reg. 7.
[51] *Ibid.*, reg. 8.
[52] S.I. 1943, No. 1306, reg. 4 (*b*).
[53] S.I. 1959, No. 639, reg. 10 (2). This implies that the local authority is competent to judge of the case committee member's competence to judge.
[54] S.I. 1959, No. 639, First and Second Schedules.

is required to give *inter alia* not only "the qualifications of members of the case committee" but their "qualifications and experience for that purpose."[55] It is also now provided that the case committee should, so far as practicable, include one man and one woman.[56]

Procedure and appeals in respect of adoption applications

The provisions for appeal represent something less than a compromise with the recommendations, which were[57] that there should be a right of appeal by way of rehearing from the making or refusal of an adoption order or interim order in the county court or juvenile court to a Divisional Court consisting of two judges of the Chancery Division of the High Court.[58] The Act provides,[59] however, that appeals from the granting or refusal of adoption orders only (not interim orders), from the juvenile court only, shall lie to a single judge and not a Divisional Court. There are also provisions[60] for adoption orders made under the present or any previous Acts, to be amended, in particular by the addition of any new name given to the adopted child within a year of the adoption order, or the correction of any mistaken identification of the child. A gap existing previously in the veil drawn by adoption over the child's natural origin is filled by the provision that on the baptism of an adopted child, the baptismal register or certificate is to describe the child as the adopted child of the adopters, and not as the child of the natural parents.[61]

The controversial recommendation[62] that on attaining majority the child should be able to discover his natural origin in England has not been implemented; neither has the one[62] that the age at which he can do so in Scotland should be raised from seventeen to twenty-one.[63] The provisions for search of the registers in England under an order of the court have been restricted; such an order can now be obtained from the High Court, the Westminster County Court or other county courts prescribed, or the court that made the adoption order to which the records relate.[64]

An important amendment[65] is that an adoption order made under the Adoption Act, 1958, or any previous Act, in favour of the child's father or mother alone, may be revoked if the child is subsequently legitimated by the subsequent marriage of his parents,

[55] First Schedule, para. 5; Second Schedule, para. 4. *Cf.* Cmd. 9248, para. 275.
[56] S.I. 1959, No. 639, reg. 10 (2).
[57] Cmd. 9248, paras. 129–138.
[58] In Scotland to the Court of Session. The provisions do not apply to interim orders: see s. 8 (5).
[59] s. 10. There is no provision in the Act about appeals in Scotland.
[60] s. 24, and Fifth Schedule, para. 6.
[61] s. 25.
[62] Cmd. 9248, para. 201.
[63] See s. 22 (4).
[64] s. 20 (5).
[65] s. 26.

and the registers amended accordingly. The provisions as to registration of adoption orders [66] have been reworded and expanded.

Substantial amendments have also been made to the provisions about the return of the child where either the placing authority [67] on the one hand, or those having possession of the child on the other, repent before an adoption order is made. The former limit of three months from the time of handing over possession of the child to the prospective adopters has disappeared, as the Committee recommended it should. Now [68] the placing authority may not, without leave of the court, give notice of intention to withdraw the child once application has been made for an adoption order. As previously, once written notice has been given on either side, the child's withdrawal or return must be made within seven days; the same now applies [69] where an interim order expires without an adoption order having been made. Where a local authority has handed over the care and possession of a child in its care to some person not with a view to adoption, and that person subsequently gives notice of intention to apply to adopt the child, this notice becomes equivalent to handing over the child with a view to adoption; the liability of other persons to contribute to the child's maintenance ceases from that date, and the child may be included in the applicant's family for the purposes of family allowances until twelve weeks have elapsed after the notice was given without any application having been made. If the adoption application is subsequently withdrawn or refused, however, the child need not be returned to the local authority unless the latter so requires.[70]

Effects of an adoption order

For the purposes of succession to property, a disposition made by will or codicil is by English law [71] to be treated as made on the date of the testator's death, except for testamentary instruments made before April 1959 and not republished thereafter.[72] This is a new and interesting exception to the general rule that the Wills Act, 1837, s. 24,[73] applies to property and not to persons.[74] A doubt whether an adopted child was a possible beneficiary of an insurance effected under the Married Women's Property Act, 1882, s. 11,[75]

66 ss. 20 and 21 for England; ss. 22 and 23 for Scotland.
67 *Viz.*, the adoption society or local authority: see note 44, *supra*.
68 s. 35, replacing Adoption Act, 1950, s. 27; *cf.* Cmd. 9248, paras. 28 and 41.
69 s. 35 (4).
70 s. 36.
71 The provisions do not apply to adoption in Scotland, where adoption still does not affect rights of succession: s. 18.
72 ss. 16 (2) and 17 (2), and Fifth Schedule, para. 4. *Cf.* Cmd. 9248, para. 160.
73 "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."
74 See, *e.g.*, *Re Whorwood* (1887) 34 Ch.D. 446.
75 It was arguable that such an insurance was "a disposition of . . . personal property . . . made . . . by will" within the meaning of the Adoption Act, 1950,

has now been resolved in favour of the adopted child, with retroactive effect.[76] It is noteworthy that children adopted under Scots law are similarly made possible beneficiaries of policies effected under the Married Women's Policies of Assurance (Scotland) Act, 1880, s. 2, in view of the fact that adoption in Scotland does not generally affect rights of succession.[77]

Any existing affiliation order[78] or agreement whereby the putative father is to contribute to the maintenance of an illegitimate child will, as before, cease on the child's adoption, and in the High Court the guardian *ad litem*, in the county court the registrar, and in the juvenile court the justices' clerk, has a duty to serve notice of the adoption order on any court which appears to have made an affiliation order[79] which is still in force with respect to the child.[80] These provisions do not apply where the sole adopter is the child's mother who is a single woman, but there is now no provision that in such a case the order or agreement shall automatically cease to operate should the mother subsequently marry.[81] On the other hand, it is now provided, with retroactive effect to orders made under the Adoption Act, 1950, that after an illegitimate child has been adopted, unless by his mother alone, no affiliation order[78] is to be made in respect of him.[82] The retroactive prohibition contained in the Adoption Act, 1950, on marriage between an adopter and a person whom he has at any time adopted, re-appears unchanged,[83] with a saving only, as before, for marriages celebrated before 1950.

Protected children

The Committee considered[84] that Part III of the Adoption Act, 1950, consisting of sections 28 to 36, was not appropriate to an Adoption Act, and should be repealed and replaced by provisions that children placed with strangers, whether with a view to adoption or not, should be deemed to be foster children. Here again a compromise has emerged. By the Children Act, 1958, s. 35 and the First Schedule, such children were to be subject to provisions

s. 13 (2), which gave a child adopted in England the interest of a legitimate child in such a disposition, provided it were made after the adoption. Attention was, however, drawn to the doubt in Cmd. 9248, para. 200.

76 s. 14 (3), and Fifth Schedule, para. 2.

77 See note 71, *supra*.

78 Including a decree of affiliation and aliment.

79 S.I. 1959, No. 479, r. 23 (2); No. 480, r. 23 (2); No. 504, r. 24.

80 Adoption Act, 1950, s. 12 (2). The Committee pointed out in Cmd. 9248, para. 199, that the provision was obsolete, since under the National Assistance Act, 1948, s. 42, a man is no longer responsible for the maintenance of his wife's children, but only of his own children.

81 s. 15 (2), and Fifth Schedule, para. 3.

82 s. 13 (3), and Fifth Schedule, para. 1.

83 This is a desirable recognition of the undoubted fact—too often overlooked—that the social reasons for prohibitions on marriage are independent of (and incidentally historically long preceded) any biological explanation.

84 Cmd. 9248, para. 63.

similar to those appearing in Part I of that Act, and applying to foster children. Part I of the Children Act, 1958 (which was not repealed by the Adoption Act, 1958), came into operation on April 1 last but the provisions of the First Schedule have now been incorporated in Part IV, consisting of sections 37–49, of the Adoption Act, 1958. These sections introduce into the law a new personality, the protected child, who is defined [85] as including (a) a child below school-leaving age placed among strangers [86] under third party arrangements [87] and (b) a child below school-leaving age in respect of whom someone not the child's parent has given notice of intention to adopt. Protected children cease to be such when adopted or when they attain eighteen years. The local authority for the area has a duty to arrange for every protected child to be visited by officers, who are given power to inspect the premises in which the child is kept [88] and are to satisfy themselves of his well-being and give advice as to his care and maintenance.[89] Persons making arrangements for placing a child who would, as a result of these arrangements, become a protected child, must give the local authority not less than two weeks' notice (instead of seven days) before the child is placed, but in the case of emergency notice not more than a week after the child has been placed is permissible. The parent or guardian of the child, or the person with whom he is being placed, has no duty to give such notice to the local authority, but the person with whom the child is placed must give not less than two weeks' notice (instead of seven days' as previously), of any permanent change of address, or in emergency may give notice one week after the change.[90] Forty-eight hours is now allowed, instead of twenty-four, for advice of the death of any such child,[91] and anyone maintaining a protected child is expressly declared to have no insurance interest in the child's life.[92] If neither a registered adoption society nor a local authority took part in the arrangements, the local authority acquires a new power to prohibit the intended placing of a child if it considers that it would be detrimental to the child to be kept by the intended person in the proposed premises.[93] Any person aggrieved by such a prohibition has the right to appeal to the juvenile court within fourteen days.[94] The juvenile court's

[85] s. 37 (1).
[86] *Viz.*, those who are not parents, guardians or relatives of his.
[87] *Viz.*, arrangements in which someone takes part who is not a parent or guardian of the child (excluding specified public authorities and voluntary associations).
[88] s. 39, replacing the Adoption Act, 1950, s. 34 (1) and (2). The term "local authority" has replaced "welfare authority" in this part of the Act, as recommended in Cmd. 9248, para. 58.
[89] s. 38, replacing part of the Adoption Act, 1950, s. 34 (1).
[90] s. 40 (4). If he is moving into the area of another local authority he is not now required to give notice to the new authority; this is done by the local authority in whose area he is living before the move, and whom he notifies under s. 40 (4).
[91] s. 40 (5).
[92] s. 46.
[93] s. 41.
[94] s. 42.

powers to order the child's removal to a place of safety have also been enlarged.[95] As previously,[96] the power may be exercised on complaint by a local authority or, on proof of imminent danger to the child's health or well-being, by one justice of the peace on the application of a children's visitor, but now the Sunday Observance Act is not to impede the execution of a removal order.[97] The most rigid sabbatarian can hardly disapprove, but welfare workers may regard the extension of their operations with mixed feelings. The powers of a local authority to receive into care a child so removed are also extended.[98] A new provision is that appeals from any order made by the juvenile court lie to quarter sessions.[99]

Penalties

Penalties for offences under the Act have been rendered more uniform. Thus the maximum fine for unauthorised persons who take part in placing children, or place them with people in whose favour an adoption order could not be made,[1] or contravene the prohibitions on payments,[2] has been reduced from £200 to £100. On the other hand, the maximum fine for contravening the law regarding rejection or withdrawal of a child placed for adoption [3] or for offences concerned with protected children [4] has been increased from £50 to £100. But the penalty for contravening the provisions about advertisements concerned with children for adoption remains unchanged at £50,[5] and so does the remainder of the section prohibiting advertisements, although the Committee recommended [6] that it should be strengthened. On the other hand, the provisions about unauthorised payments have now been made more specific.[7] The Committee also recommended more prosecutions of unlicensed persons who arrange third party placings without notification,[8] in order to publicise the requirements as to notification to the authorities. Only time will show how far this recommendation will be implemented.

O. M. Stone.

[95] s. 43, replacing the more narrowly conscribed powers of the Adoption Act, 1958, s. 33.
[96] Adoption Act, 1950, s. 33 (2).
[97] s. 43 (2).
[98] s. 43 (3), extending the local authority's powers under the Children Act, 1948, ss. 1, 2.
[99] s. 48.
[1] Adoption Act, 1950, s. 22 (2), replaced by s. 28 (3).
[2] s. 50 (2), replacing Adoption Act, 1950, s. 37 (3).
[3] Adoption Act, 1950, s. 27 (5), replaced by s. 35 (6).
[4] Adoption Act, 1950, s. 35, replaced by s. 44.
[5] s. 51 (2), replacing unchanged the Adoption Act, 1950, s. 38 (2).
[6] Cmd. 9248, paras. 237–238.
[7] s. 50 (1), replacing Adoption Act, 1950, s. 37 (1). *Cf.* Cmd. 9248, para. 235.
[8] Cmd. 9248, para. 51.

NOTES OF CASES

Imputations on the Prosecution

The Court of Criminal Appeal, consisting of Lord Parker C.J. and four other members, has recently thrown further light on the troublesome question of the effect of imputations on the prosecutor or witnesses for the prosecution. In *R.* v. *Cook* [1] the appellant had been convicted at Quarter Sessions of obtaining a motor-car by false pretences and of receiving stolen cheque forms. For the prosecution a constable swore that the accused made an oral and a written statement, both of which included incriminating matter. In cross-examination of the constable the accused, who conducted his own case, suggested that the statements had been procured by the threat that, if he did not speak, his wife would be charged. The witness denied this suggestion, and as a matter of interest it may be noted that the wife was indicted but tried separately. The accused man gave evidence in his own defence, and in cross-examination he asserted that the statements were made in consequence of the threat to charge his wife. Counsel for the prosecution stated to the Chairman that he wished to put further questions; the Chairman said that, while counsel was strictly entitled to do so, he would have thought it unnecessary; but counsel then cross-examined the accused as to his criminal record. On appeal it was contended that this cross-examination was inadmissible under the Criminal Evidence Act, 1898, s. 1, proviso (*f*), which provides that—

> "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

The argument for the appellant was (*inter alia*) that the nature or conduct of the defence did not involve imputations on the character of the prosecutor or the witnesses for the prosecution. The Court of Criminal Appeal held that it did, but that the Chairman in his discretion should have refused to allow the cross-examination as to previous convictions. The appellate court further held that it was not clear whether the Chairman had exercised his discretion to permit

[1] [1959] 2 W.L.R. 616; [1959] 2 All E.R. 97, C.C.A.

the cross-examination, and therefore that the appellate court might exercise its own discretion; that the questions should not have been put without warning the defence; but that there had been no miscarriage of justice. The appeal was accordingly dismissed. This decision thus raises three distinct points of major importance—the first on what constitutes an imputation on the prosecution; the second on the construction of the rest of the relevant provision; and the third on the judicial discretion in criminal trials, with any ancillary practice.

(1) Proviso (*f*) (ii) is far from happily drafted. It is not clear that it was necessary to mention both the prosecutor and the witnesses for the prosecution, for the latter will normally include an actual prosecutor, and the Crown as prosecutor is not likely to suffer imputations; or to refer to imputations and witnesses in the plural, since a single imputation on a single witness is sufficient, presumably by virtue of the Interpretation Act, 1889, s. 1 (1) (*b*), to bring the proviso into operation, and has done so in various cases (including the present) without argument on plurality or singularity. The courts have generally limited the meaning of "imputation" to favour the accused; an emphatic denial of the offence, coupled with the assertion that the prosecutor is a liar, was not an imputation [2]; and the reports contain numerous subtleties on this point. But, as will be seen below, the word "imputation" has now generally to be given its ordinary meaning.

(2) The main difficulty which has arisen is due to the words, "the nature or conduct of the defence is such as to involve imputations." Most defences cannot be raised or developed without an imputation on the prosecution, for even an unemphatic denial of the offence implies some form of error on the part of the prosecution, if no more. Particularly in charges of rape, when the issue raised by the defence is consent to sexual intercourse, the trial of the issue must involve an imputation of immorality on the part of the prosecutrix. For that reason, apparently, the courts have treated this defence to rape as an exception to the rule laid down by the statute, even in cases where the defence involves not merely an allegation of unchastity but also an imputation of preliminary immorality.[3] Even in other types of case attempts have been made to modify the wording of the statute. Thus in *Stirland* v. *Director of Public Prosecutions* in the House of Lords Viscount Simon L.C. purported to provide a code on this subject. His six propositions, some of which have been the subject of well-justified criticism, included the rule that "an accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses." [4] But this was a generalisation based

[2] *R.* v. *Rouse* [1904] 1 K.B. 184, C.C.R.
[3] *R.* v. *Turner* [1944] K.B. 463, C.C.A.
[4] [1944] A.C. 315, at 327, H.L.

on the case previously cited [3] and a gloss upon the statute; it was *obiter*; and it was contrary to an earlier ruling of the Court of Criminal Appeal.[5] That court soon afterwards explained away the Lord Chancellor's dictum and reaffirmed its previous construction [6]; and has done so in more than one judgment since, including that now under consideration.[7] The construction adopted by the Court of Criminal Appeal recognises that the statute means what it says; that it is not legitimate to qualify the provision by inserting "unnecessarily" or "unjustifiably" or other words; and therefore that, except in cases of rape which are to be treated as *sui generis*, any recognised imputation on the prosecution justifies cross-examination as to the criminal record of an accused person who gives evidence.

(3) But to qualify this literal construction of an ill-drafted provision the courts have assumed a discretion to exclude such cross-examination. This is but one illustration of the assumption of a jurisdiction to exclude evidence in criminal trials which has developed during the present century.[8] As the writer has shown elsewhere,[9] the discretion has been asserted in relation to at least five situations—evidence of informal admissions by accused persons, confessions, bad character or previous convictions, similar facts and things wrongfully procured. In the majority of these cases the discretion merely involves a modification of the common law. Yet in the case of cross-examination as to the accused's record the discretion is superimposed upon a statutory provision. Together with the discretion there have grown up some auxiliary practices. The judge may warn the defence that it is going too far [10]; in any event it is customary for prosecuting counsel to invite the court to give a ruling on the admissibility of the proposed cross-examination: indeed, over thirty years ago the Court of Criminal Appeal expressed the opinion that "this kind of question is best prefaced, whenever it is put, by an express application to the judge in order that the judge may have an opportunity of preventing it if he thinks it desirable to prevent it." [11]

The present position, as shown by the reserved judgment of the Court of Criminal Appeal delivered by Devlin J. in *R.* v. *Cook*,[12] seems to be this. Cross-examination as to the accused's record is dependent on the statutory provision cited earlier in this note. That

[5] *R.* v. *Hudson* [1912] 2 K.B. 464, C.C.A.
[6] *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, at 13, 14, C.C.A.
[7] [1959] 2 W.L.R. 616, at 621.
[8] The recognition of a discretion in this type of case appears to be earlier than *Maxwell* v. *D.P.P.* [1935] A.C. 309, at 321, H.L. (regarded in *R.* v. *Cook* [1959] 2 W.L.R. 616, at 620 as the starting point). See *R.* v. *Watson* (1913) 8 Cr.App.R. 249.
[9] "The English Jury and the Law of Evidence" (1956) 31 *Tulane Law Review* 153, at 162.
[10] *R.* v. *Cook* [1959] 2 W.L.R. 616, at 622, C.C.A.
[11] *R.* v. *McLean* (1926) 19 Cr.App.R. 104, at 108.
[12] [1959] 2 W.L.R. 616, C.C.A.

provision is to be construed so as to give the words their natural and ordinary meaning, and any recognised imputation on the prosecution makes it operative. But the courts exclude the defence of consent in cases of rape from the operation of the provision altogether, and in other cases they exercise a discretion whether to apply the statute. No doubt the exclusion of evidence which Parliament has made admissible is designed to prevent undue prejudice to accused persons with criminal records; but, whatever the motive, the assumption of a discretion not to enforce a statute is open to objection. In another context Devlin J. himself has approved a criticism of judicial discretion in general [13]; and the objection that a discretion renders the law uncertain is particularly applicable to evidence. As long ago as 1790 Grose J. exclaimed, "I dread that rules of evidence shall ever depend upon the discretion of judges; I wish to find the rule laid down, and to abide by it." [14] In the criminal law certainty is especially necessary, not least because every criminal trial in England does not take place before one of Her Majesty's Judges but the Criminal Evidence Act applies to all criminal tribunals. This discretion to exclude admissible evidence carries with it a discretion to let in evidence which might have been excluded on a liberal construction of the Act. When a statutory rule of evidence is so defective that it requires palliation by discretion, the Act would appear to demand amendment. The section has been in force for over sixty years and has accumulated a mass of case-law; its effective application has engaged the attention of appellate courts for over fifty years; and there is much to be said for the view that the time has arrived for Parliament to repair the deficiences of its predecessors. Indeed, the conflicting treatment of the statute by the courts has now resulted in a clear announcement of a judicial discretion to suspend some of its provisions on evidence. One can imagine Sir Nash Grose turning in his grave at this development, and Mr. Jeremy Bentham emerging from his cabinet at Gower Street to shake a desiccated quill at "Judge and Co."

G. D. Nokes.

Two Problems in Causation

R. v. *Smith*,[1] a case in the Courts-Martial Appeal Court, raises important problems in both evidence and criminal law. Briefly the facts are that Smith was charged with, and convicted of, the murder of a soldier who died of stab wounds after a fight between men of different regiments sharing the same barracks. The Regimental Sergeant-Major of Smith's regiment paraded his company and said that they would remain on parade until those involved in the fight owned up. After some time Smith confessed. On the

[13] "Statutory Offences" (1958) 4 J.S.P.T.L.(N.S.) 206, at 209.
[14] *R.* v. *Inhabitants of Eriswell* (1790) 3 T.R. 707, at 711.
[1] [1959] 2 W.L.R. 623; [1959] 2 All E.R. 193.

following day a sergeant of the Special Investigation Branch interviewed Smith, cautioned him, and said: "I understand that after the disturbance you admitted to your R.S.M. that you had been involved and that you stabbed three men." Thereupon Smith made a written confession. Both confessions were admitted as evidence at his trial. Meanwhile the deceased man, who had two stab wounds, was being carried to the medical reception station by a fellow soldier. On the journey the soldier tripped and later he again dropped the deceased. The station was busy and the deceased was not thought to be seriously wounded. One of the stab wounds had in fact pierced the lung and caused haemorrhage. The treatment given was a transfusion of saline solution and later oxygen and artificial respiration. The artificial respiration was particularly unsuitable treatment, for wounds of this type tend to heal themselves. Medical evidence for the defence indicated that had facilities for blood transfusion been available the chance of recovery was as high as 75 per cent.

It was urged for Smith that neither confession should have been admitted as evidence. As to the first, the court, in a judgment of Lord Parker C.J., held that although the conduct of the R.S.M. was not improper, the confession was the result of the threat of a prolonged parade or, put otherwise, the inducement of an early end to the parade. No cases were cited and it has been suggested that it could be argued that the inducement was not connected with the accusation and so the confession was admissible.[2] This principle was adopted in *R.* v. *Joyce* [3] where, however, the statement "I need a statement from you" which was relied upon as the inducement or threat was so neutral as to weaken the case as a precedent. It was also applied in *R.* v. *Lloyd* [4] where the promise was that the suspect would be allowed to see his wife. It can only be concluded that the principle so formulated in those cases is too narrow and that inducements affecting the suspect's freedom or bodily comfort will suffice to make a subsequent confession inadmissible. This problem does not arise with regard to threats and the circumstances in *Smith's* case can be construed as both inducement and threat.

Of greater interest is the decision that the second confession was admissible. The court recognised that Smith was put into difficulty by his first confession and the first confession was deliberately used to obtain the second.[5] The test applied to the second confession was whether the original inducement was still operating on the mind of Smith at the time he made it. Clearly it was not doing so.

2 Commentary by Professor J. C. Smith [1959] Crim.L.R. 442. This is a well-established principle, see Kenny, *Outlines of Criminal Law* (16th ed.), at p. 492; Cross, *Evidence*, at p. 439.

3 (1957) 42 Cr.App.R. 19.

4 (1834) 6 C. & P. 393.

5 [1959] 2 W.L.R. 623, 627.

This rule is well established.[6] But some of the cases cited concern only one confession,[7] there having been a denial at the time the inducement was offered, and the same test, whether the confession made at the later time was tainted by the earlier inducement was used. Only two of the cases clearly [8] involve two confessions. In *R.* v. *Richards*[9] the second confession was made to a constable without any reference by him to the first. The court merely applied the continuing inducement rule, decided that on the facts the inducement was spent and so the statement was admissible. In *R.* v. *Rosa Rue*,[10] however, the further point was taken whether the use of the earlier confession as a step towards the second made that second confession inadmissible. In this case a mistress obtained a confession from a servant having promised not to hurt her or send for the police. A neighbour, told of the full position and the confession, then questioned the servant and obtained a second confession. The second confession was held to be "so connected under the circumstances with the inducement"[11] as to be inadmissible. The circumstances were, the time that had elapsed was short, the confession was obtained by questions and these questions were based on information obtained in an inadmissible confession. Denman J. recognised that "the objection to it here is, that it would not have been made but for the previous involuntary statement."[12] When considering this decision the court in *Smith's* case appears to have put too little emphasis upon this last point and applied the rule that the passage of time and the cautions given by the sergeant of the S.I.B. were enough to end the inducement. Where, as in *Smith's* case, the inducement itself has clearly lapsed, earlier cases do not help to decide this objection that the confession would not have been made but for the earlier induced statement. It is being urged that there is a further ground for inadmissibility and it is a somewhat inconclusive answer to say that the direct inducement ground clearly does not apply.

The approach adopted concentrates on the inducement rather than on the mind of the prisoner. His dilemma clearly springs from the inducement and the, for him, unfortunate consequences that have followed. It cannot be said, putting the matter negatively, that despite the inducement there would have been a confession.

[6] *R.* v. *Meynell* (1834) 2 Lew.C.C. 122; *Sherrington's Case* (1838) 2 Lew.C.C. 123; *R.* v. *Doherty* (1874) 13 Cox C.C. 23; and *R.* v. *Rosa Rue* (1876) 13 Cox C.C. 209 were referred to. There are numerous others, *e.g.*, *R.* v. *Clewes* (1830) 4 Cox P. 224; *R.* v. *Richards* (1832) 5 C. & P. 318; and *R.* v. *Hewitt* (1842) Car. & M. 534.

[7] *e.g.*, *R.* v. *Hewitt* (*supra*).

[8] There is doubt about *R.* v. *Doherty* (1874) 13 Cox C.C. 23. The report is not clear although Parker C.J. in *Smith's* case treated it as an example of a second statement, as it probably was. No reference is made to the first.

[9] (1832) 5 C. & P. 318.

[10] (1876) 13 Cox C.C. 209.

[11] *Ibid.*, at p. 211, *per* Denman J. who had consulted with Kelly L.C.B. on this point.

[12] *Ibid.*, at p. 210.

The whole problem seems to arise from the need to allow the investigator greater scope than the law allows the prosecutor when he puts his evidence forward. So the court in *Smith's* case approved the R.S.M.'s procedure although no doubt it would not approve similar conduct by the police. Similarly it has long been established that the investigator can use the information contained in the inadmissible confession.[13] The attitude of the court is somewhat harsh to the prisoner. He can say, "But for the inducement I would never have confessed; but for that confession I would never have confessed again." He is supported in this by the use of the first confession to obtain the second and yet, on the ground that the promise inducing the confession no longer applies, the court has shown itself unwilling to regard the chain of causation as a valid one. It would have been more consistent with the earlier authorities and more in harmony with *R.* v. *Rosa Rue* to have decided that where the earlier confession was used as a deliberate lever then the inducement continued in that form.

The final point in *Smith's* case concerns the cause of death. The court, applying rules of causation, held that there was nothing "unreasonable or extraneous or extrinsic"[14] and said that "if at the time of death the original wound is still an operating cause, the death can properly be said to be the result of the wound, albeit that some other cause of death is operating."[15] Only where the wound is "merely the setting"[15] or "merely part of the history"[15] can there be said to be a broken chain of causation. In the light of this *R.* v. *Jordan*,[16] where mistreatment broke the chain of causation, appears at first sight to be inconsistent but it can be reconciled to some extent. In that case, death followed an injection of terramycin by a doctor. The injured man was intolerant and this was known to colleagues of the doctor. The important fact, however, was that the wound was nearly healed, and so was merely the reason why injections were being given rather than the cause of death. The wound could be treated as a setting or part of the history to show why injections were being given.

Two reasons distinguished *Smith's* case. The wound was still in a serious state when the mistreatment was given and secondly the mistreatment killed via the wound and not, as in *Jordan's* case, in a separate way. Neither is a satisfactory ground for the decision. If the medical evidence of the defence is accepted, there was a very good chance that the wound was not fatal by itself. The time at which the mistreatment was given and the way it operated prevented this from being certain, and ensured that the wound continued as a cause of death.

It is unfortunately impossible to say that the case law provides

[13] *e.g.*, to find stolen property. *R.* v. *Warickshall* (1783) 1 Leach 263.
[14] *Per* Lord Wright in *The Oropesa* [1943] P. 32, 39, quoted at p. 629.
[15] *Ibid.*, at p. 628
[16] (1956) 40 Cr.App.R. 152.

a clear rule of causation to be applied in such cases. Early case law is obviously of little importance for medical treatment and practice were far removed from the standards expected today. Nevertheless, the cases have always shown an inconsistency and there has probably been no time when a clear rule could be formulated. Hale distinguished mortal wounds from others.[17] Death following lack of care or miscare of a mortal wound was homicide and only where the wound was not of itself mortal would mistreatment break the chain of causation. The principal factor was the nature of the wound [18] but other cases turned as well upon a consideration of the skill of the medical treatment,[19] although Mathew J. in *R.* v. *Davis* [20] went so far as to indicate that improper treatment by medical men was not a defence open to the accused. It was upon this uncertainty that the decision in *Jordan's* case was based. It appeared to have been settled that where death resulted from a negligent act of medical attendants and would not otherwise have occurred the chain of causation was broken and the inflicter of the wound was not guilty of homicide. This new certainty was welcomed [21] although the likely medical disputes that might in future arise were thought to be undesirable by medical commentators.[22] *Smith's* case appears to have reversed the position and marked a return to the older proposition that if the wound was the sort to cause death then the treatment thereafter given can be ignored, except perhaps in the grossest cases. *Jordan's* case was distinguished as " a very particular case depending upon its exact facts," [23] which is clear renunciation of the principle which, as has been seen, it was thought *Jordan's* case had given rise to.

There are, however, three aspects of this case which may weaken it as a precedent. Earlier case law was not discussed in the judgment apart from *Jordan's* case. The rule of causation adopted was taken from civil cases [24] and the standard applied approximated to that required to establish a *novus actus interveniens* in tort. The transplanting of civil standards into the criminal field is beset with dangers made greater in that instance in that the civil rules are not without ambiguity and difficulty. There was also a clear indication that the court did not regard the medical treatment as inappropriate in the circumstances. It is *Smith's* case, rather than *Jordan's* which has unusual circumstances in that the medical treatment available and the pressure upon it at the time were not those which might normally be expected. It is

[17] Hale P.C. 428.
[18] *R.* v. *McIntyre* (1847) 2 Cox 379; *R.* v. *Lockley* (1864) 4 F. & F. 155.
[19] *R.* v. *Clark* (1842) 6 J.P. 808.
[20] (1883) 15 Cox 174.
[21] " Causation in Homicide," Glanville Williams [1957] 3 Crim.L.R. 429, 510 *et seq.*
[22] " Causation in Homicide—A medical view," Francis E. Camps and J. D. J. Havard [1957] Crim.L.R. 576.
[23] [1959] 2 W.L.R. at p. 627.
[24] *The Oropesa* [1943] P. 32; *Min. of Pensions* v. *Chennell* [1947] K.B. 250.

not conceivable that the decision in *Smith's* case has affected the situation where medical negligence arises in circumstances providing no excuse for it.

On many counts *Smith's* case is unsatisfactory. It has brought uncertainty afresh to the question of causation in homicide. It has answered two problems of causation in such a markedly different way: the strictness of the rule in evidence, the weakness of the rule in homicide both unhappily operated against the accused: if either standard had applied throughout, the result must have been different.

J. C. Wood.

Group Insurance and the Fatal Accidents Acts

An employer who insures his servants against accidents, without however giving them any rights under the contract of insurance, and who then voluntarily hands over the payment he has received from the insurer to the dependants of a deceased servant, cannot compel them to bring this payment into account if they should claim from him damages under the Fatal Accidents Acts. It was held in *Green* v. *Russell* [1] that such payments fall within the terms of the Fatal Accidents (Damages) Act, 1908, which had established an exemption from accountability for insurance payments, since this Act was only concerned to describe the origin of the payment without regard to the question whether the deceased had been a party to the contract of insurance or whether he had been entitled, at law or in equity, to enforce it. Although this decision has now been affirmed by the Court of Appeal,[2] the majority of the Court has refused to accept the view that by virtue of the Act of 1908 all insurance payments payable on the death of the deceased are henceforth to be labelled free from accountability if they eventually come into the hands of the dependants of the deceased. It was thought possible, however, to apply the Act to a contract of insurance if it could be shown that it had been effected with the intention to benefit the servant, even if he had not been given the right to enforce it. As in *Bowskill* v. *Dawson* [3] the Act had been held to apply where the servant is beneficiary under a trust, its application could now be extended to contracts made for his benefit, even if he had not been established in the position of beneficiary under a trust.

In contrast to the "labelling" theory, which assumes that the legislator himself had provided the answer to the question which was raised in *Green* v. *Russell*, the judgment of the majority of the Court of Appeal could claim no more than that extending the Act to cover the facts of this case could be reconciled with the language

1 [1958] 3 W.L.R. 371; [1958] 3 All E.R. 44. For comment see (1959) 22 M.L.R. 96.
2 [1959] 3 W.L.R. 17; [1959] 2 All E.R. 525.
3 [1955] 1 Q.B. 13.

and the general sense of the legislation. This approach to the task of statutory interpretation seems more convincing if it is remembered that the legislature in 1908 could not have attempted to regulate the effects of group insurances which were then unknown. On the other hand the decision of the Court of Appeal no less than that of Ashworth J. in the court of first instance has an air of unreality inasmuch as the employer, in his capacity as tortfeasor liable to pay damages, was held not entitled to deduct a payment which *ex hypothesi* he could not be compelled to make. A decision in favour of the dependants can be said to be in accordance with the general sense of the legislation which was clearly in the direction of providing relief for the dependants; but even if this should be taken as including not only the desire to secure to the dependants the full benefit of the deceased's own thrift in the form of insurance which he himself had taken out, but also to deny to the tortfeasor the benefit of insurance for which a third party had paid, it still would not follow that the tortfeasor should be denied the benefit of insurance which the tortfeasor had effected and for which he had paid. In future cases of this kind, employers will most likely be advised to wait until their liability to pay Fatal Accident damages has been determined, before deciding whether to hand over to the dependants payments received under group insurance policies.

Since the decision will be easily circumvented and since in any case it was emphasised that it depended on the terms and circumstances of the particular policy of insurance in issue, the judgment of the Court of Appeal will be only of limited importance. There remains, however, as a matter of general interest the fact that the court unanimously refused to accept the view repeatedly expressed by Lord Denning that a person interested can sue on a contract expressly made for his benefit. It would seem doubtful whether the observations on this point can be dismissed as *obiter dicta*, significant chiefly as further indication that the force of the movement for reform of the common law from within, which had achieved some spectacular successes during the decade after the war, has now been spent and that the current trend is towards caution and orthodoxy. The question whether the deceased servant was entitled at common law to enforce payment of the insurance money as third party beneficiary was left open by Ashworth J. who referred to it only at the very end of his judgment, after the case had already been decided by him on other grounds; but Romer L.J. preferred to deal with this contention before considering the alternative contentions of the plaintiff. This deliberate change of order suggests that the issue of the rights of a third party beneficiary was considered an essential link in the reasoning and that this argument had to be disposed of before the remaining contentions could arise. Whatever the formal nature of the discussion of the rights of third party beneficiaries, it cannot be claimed that the Court of Appeal has made a decisive contribution to the solution of this problem. This would

require more than a mere citation of authorities, coupled with the suggestion that some of them might not have been present to Lord Denning's mind, which, with respect, appears to be unlikely.[4] In view of the confused state of the authorities and of the wide ramifications of this controversy, its settlement would require an analysis of first principles and of their practical implications, a task more suitably left to academic research rather than left to be performed in the course of the judicial process.

J. Unger.

Servant Suing Master for Negligence, in Contract

The interlocutory appeal in *Matthews* v. *Kuwait Bechtel Corporation* [1] raised, as a question of practice and procedure, this neat question: Is an action by a servant against a master for personal injuries solely an action in tort? Is it solely and independently of contract, an action for damages arising out of the breach of a legal duty to take care? Or can it also be separately framed in contract, as a breach of an implied term of the contract of employment?

Such an action is fought, as a general rule, in tort. In the present case, however, the writ, originally framed in tort, had been amended and damages were claimed as the result of an accident caused by breaches of contracts of employment. The defendants were resident in Kuwait. Through their agents in England, the plaintiff had agreed to enter their service as a foreman millwright in Kuwait. He had gone out there and a month later, when engaged on the construction of a pump, had fallen into a trench while stepping back to avoid a load swinging from a crane. Now a writ framed in tort committed outside the jurisdiction cannot be served out of the jurisdiction: Ord. 11, r. 1 (*ee*). To secure an order for such service, the writ was amended and relief was claimed in respect of a breach of contract so as to bring the action within Ord. 11, r. 1 (*e*). The subsections in the Order are to be read disjunctively: each subsection is complete in itself and is independent of the other.[2] The contract—a long, printed document—contained no reference to any duties placed upon employers to take care with regard to the premises on which the plaintiff would work. Clause 12 provided that the agreement should be construed in accordance with English law and that the written agreement embodied the whole arrangement between the parties. On the other hand, as Sellers L.J. points out in his clear and vigorous judgment, English law does permit the implication into

[4] *Cf.* the observations made by Lord Denning on this point in his address to the Society of Public Teachers of Law, meeting in Oxford in September, 1959.

[1] [1959] 2 W.L.R. 702; [1959] 2 All E.R. 345. Now reported at [1959] 2 Q.B. 57.

[2] *Tassell* v. *Hallen* [1892] 1 Q.B. 321, 323, 324, *per* Lord Coleridge C.J.

the contract of service, of certain duties of reasonable care for the servant's safety.

Master Diamond gave leave to serve a concurrent writ in Panama where the defendants were residing, and McNair J. upheld his order. On appeal, Sellers L.J. (with whom Willmer L.J. concurred) dealt with the point realistically and in the light of the reasoning in recent authorities.

Sellers L.J. begins by pointing out that in his experience the claim could be made either in contract or in tort and had frequently been so pleaded without exception taken.[3] The practice of experienced pleaders—among whom, both on the Northern Circuit and in The Temple, the learned Lord Justice was numbered—is, it is submitted, both relevant and material. In a case like this (quite apart from the question of service out of the jurisdiction), would not one plead that the defendants were in breach of the legal duty of care they owed to the plaintiff and also in breach of an implied duty under their contract of employment? That, at least, is how such a case was frequently pleaded by those whose pleadings were regarded as precedents on the same circuit.

Next, Sellers L.J. turns instantly to the most recent case on master and servant, in the House of Lords: the *Davie* case.[4] There, a workman had claimed damages from his employers for injury caused to him by a defective tool which they had bought from reputable suppliers. The question was the extent of the employer's duty of care for the safety of the workman.[5] Viscount Simonds said: " . . . it is well to remember that we are dealing with a case of tort. The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment. . . . "[6] Indeed, Lord Herschell, in the *locus classicus* of his speech in *Smith* v. *Baker & Sons*, expressly bases the employer's duty of reasonable care upon the contract of employment.[7] It is true that Lord Reid in his speech in the *Davie* case[8] observes: " A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as a part of the law of tort." On the other hand, he refers to " the other possible way of regarding the master's duty "—words which imply the validity of " the other way."

[3] [1959] 2 W.L.R. at p. 706.

[4] *Davie* v. *New Merton Board Mills, Ltd.* [1959] 2 W.L.R. 331.

[5] See C. Grunfeld's analysis of the case in the Court of Appeal, at (1958) 21 M.L.R. 309, in favour of the dissenting judgment of Jenkins L.J. (as he then was) and when the case was on its way up to the House of Lords, Dr. A. L. Goodhart's discussion of the legal and social interests involved, from both points of view (1958) 74 L.Q.R. 397–406.

[6] [1959] 2 W.L.R. at p. 706; see Diamond, *Master and Servant*, Supp. to 2nd ed., Art. 58. Batt, *Master and Servant* (1950), 4th ed., 3, 18, 330, and Munkman, *Employer's Liability at Common Law* (1955), 3rd ed., at pp. 60, 61, regard the duty of care as resting upon tort rather than in contract.

[7] [1891] A.C. 331, at p. 362.

[8] [1959] 2 W.L.R. 331, at 356.

Three other authorities may be mentioned.

(i) *First*: Some unambiguous observations in the judgment of Lord Justice-Clerk Aitchison in the Court of Session, in *English* v. *Wilsons & Clyde Coal Co.*,[9] prefaced by the words: "Upon what terms and conditions is the servant to be presumed to contract in the absence of express stipulations?" And in *Wilsons & Clyde Coal Co.* v. *English*, Lord Wright, speaking of the employer's "personal" duty, said: "The same principle, in my opinion, applies *to those fundamental obligations of a contract* of employment which lie outside the doctrine of common employment . . ." [10]

(ii) *Secondly*, Sellers L.J., taking the view that since 1861 the action may, within limits, be framed on either basis, considers the dicta in the *Lister* case,[11] where the House of Lords held that the driver of the lorry, in the performance of his duty as a driver, was under a contractual obligation of care to his employers. The same reasoning which imposes on a servant a contractual duty of care applies—Sellers L.J. infers—"equally and even more obviously to the case of the obligation of an employer."

(iii) *Thirdly*, since the action lies in contract as well as in tort, the old case of *Riley* v. *Baxendale* [12] cited in the third edition of Bullen and Leake "goes into the limbo of lost causes." [13]

[9] 1936 S.C. 893, 910; writer's italics.
"*All these*" [reasonable presumptions, *i.e.*, the selection of suitable servants, proper appliances and safe system of work] "*can fairly be postulated, in the absence of contrary stipulation, as implied conditions in every contract of service. They are reasonable conditions of service and the risk of their non-fulfilment is a master's risk.*"

[10] [1938] A.C. 57, 78; writer's italics. Mr. Munkman's submission that although the *relationship* of master and servant springs from the contract of service, it does not follow that the master's duties are *implied terms* of the service contract, does not appear to be consistent at least with the views of Lord Herschell and Lord Wright (*op. cit.*, at p. 61). Cited with approval in Salmond, *Torts*, ed. Heuston (1957), 12th ed., at p. 131, and mentioned without discussion by Sellers L.J. in his judgment at [1959] 2 W.L.R. at p. 710.

[11] *Lister* v. *Romford Ice & Cold Storage Co., Ltd.* [1957] A.C. 555. Viscount Simonds declares: "It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract." Of this, the negligence of a servant in performance of his duty is a clear example (*ibid.*, at p. 573). And Lord Radcliffe says that the obligation is "as much contractual as tortious" (*ibid.*, at p. 587).

[12] (1861) 6 H. & N. 445. Martin B. said: "On the hiring of a servant no such contract as this is to be implied: there is a mere contract of service" (at p. 447). And this, of Wilde B.: "I should be slow to doubt that a new contract of this sort is to be implied" (at p. 448). The point of Pollock C.B.'s judgment appears to lie in this sentence: "I think the doctrine established by *Priestly* v. *Fowler* (1857) 3 M. & W. 1, ought not be trenched upon." If that be the real basis of the decision, since common employment has gone, with it too has gone this decision.

[13] [1959] 2 W.L.R. at p. 711, *per* Sellers L.J.

(iv) *Lord Denning's view.* On the other hand, Denning L.J. (as he then was) basing himself upon the reasoning in several authorities, came to the conclusion in his dissenting judgment in the Court of Appeal in the *Lister* case—a conclusion with which Lord Radcliffe did not agree [14]—that the action against a servant "must be founded on tort." [15] To say that the servant impliedly agreed to use reasonable care, Lord Denning thought, does not truly represent the facts, for he would thus often be *warranting* that he would never make a mistake.[16] "The liability of the employer," Denning L.J. continues (dealing with the converse case where a servant is injured by the negligence of the employer), "is always regarded as a liability in tort, not in contract." [17] The courts, the judgment continues, have increased the master's liability "by developing the law, not by altering the contract."

The present writer is among those who feel in deep sympathy with Lord Denning's endeavours to liberalise and rationalise the law and to free it from fictions that have had their day. But on the present issue is not Lord Denning, with great respect, seeking to place in the same category the implied term which is *genuinely contractual*, with the implied term which is not genuinely contractual, but is really *constructive*? The first is a genuine implied term; the second a legal fiction. The implied term frustrating a contract, it is submitted, is clearly a legal fiction, a constructive term, a term that, regardless of the intention of the parties, the law imposes.[18] The implied term which a driver may be regarded as stating; "I promise to drive carefully"—is not *that* term, with respect, in a different legal category altogether? If, at the outset of the service, he were asked about this activity, would not his answer be to some such effect as above, namely, "I promise to drive carefully"? Denning L.J. declares: "The obligation of the employer is an obligation imposed by the law. It arises out

[14] *Ibid.*, at pp. 587, 588.

[15] *Romford Ice & Cold Storage Co., Ltd.* v. *Lister* [1956] 2 Q.B. 180, 187–189.

[16] Denning L.J. had himself suggested that mode of formulating the claim in *Jones* v. *Manchester Corpn.* [1952] 2 Q.B. 852, 868, but in the *Lister* case he reconsidered this view and did not think it correct: [1956] 2 Q.B. at p. 187.

[17] [1956] 2 Q.B. at p. 188. "If you read through the whole of *Wilsons & Clyde Coal Co., Ltd.* v. *English* ([1938] A.C. 57) you will not find a word to suggest that the employer's liability nowadays rests on an implied term." But with great respect, is not this implicit in Lord Wright's speech ("those fundamental obligations of a contract of employment . . . for the performance of which employers are absolutely responsible") at p. 78, and in the speech of Lord Maugham, at p. 88? The critical examination of these dicta by Viscount Simonds and Lord Reid in the *Davie Case* [1959] 2 W.L.R. 331, 340–344, 349–351, would not appear to affect this point.

[18] See *per* Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.* [1926] A.C. 497, 510, and Anson, *Principles of Law of Contract* (1959), 21st ed., 436–439. Lord Radcliffe takes a different view: *Davis Contractors, Ltd.* v. *Fareham U. D. C.* [1956] A.C. 696, 729.

of the relationship of master and servant, not out of any promise to use reasonable care." May one not agree, with respect, that historically, the obligation does arise out of the relationship of master and servant, without necessarily agreeing with the view that it does not arise out of any promise to use reasonable care? And if it be asked: form of words apart, what is the heart of the matter? Does not the law in point of fact really impose upon the master this obligation? May not the answer be this? As a matter of history the law has, in fact, formulated this obligation, but it is nevertheless an obligation—in contradistinction, *e.g.*, with the "implied term" in frustration, or the rule of common employment —that the master (if he were asked), may fairly be held to have genuinely agreed to assume.

Lord Denning also points out that were the servant liable in implied contract, the master could sue him in negligence although he had suffered no damage. "That cannot be right" for "damage is the gist of the action." [19] In practice, of course, such an action would not be brought although, if it were, would not nominal damages be recovered? [20]

A number of cases upon section 116 of the County Courts Act, 1888, dealt with costs which may depend upon whether the action was "founded on tort" or "founded on contract." Thus in *Taylor* v. *Manchester, Sheffield & Lincolnshire Ry.*[21] A. L. Smith L.J. said: "It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in either contract or tort; but this is not the governing consideration . . ."

It may be pertinent, however, to observe that the cases on costs arise out of a statutory provision: was the action—"in substance," *i.e.*, apart from the form of the pleadings—"founded on" contract or tort? The question under Ord. 11, r. 1, is quite different: is the

[19] [1956] 2 Q.B. at p. 188: "If the domestic servant was careless but broke nothing, the master would have no cause of action."

[20] Anson, *op. cit.*, at p. 472.

[21] [1895] 1 Q.B. 134, 140. Denning L.J. also cites *Jackson* v. *Mayfair Window Cleaning Co., Ltd.* [1952] 1 T.L.R. 175, 177, where cleaners, under contract with the owner, carelessly broke a chandelier. Barry J. held that the action was "founded on tort" and not "founded on contract" within s. 47 (1) of the County Courts Act, 1934, for the plaintiff, in order to succeed, would not need to rely upon a contract. This case concerned the duty of care independently of contract owed by an expert, who undertakes, either gratuitously or under contract, to do something which involves a skill he holds himself out as possessing. Barry J. quotes from the judgment of Greer L.J. in *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K.B. 399, 404, 405, and from the judgment of Denning L.J. (as he then was) in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, 180, where Denning L.J., discussing the duty of persons "who engage in a calling which requires special knowledge and skill," cites Fitzherbert in his new *Natura Brevium* (1534), 94 D: "If a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well . . . for it is the duty of every artificer to exercise his art rightly and truly as he ought." In the *Lister* case, Denning L.J. applies this dictum to the relationship of master and servant generally.

action " founded on " a tort committed within the jurisdiction, or—the words are not " founded on contract "—is it an action, " to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract . . . "?

George J. Webber.

The Disobedient Servant

It is a weakness of the law relating to the contract of employment that, whereas it was the subject of considerable litigation and development during the nineteenth century, the emphasis has now passed to the position in tort. Few cases review the contractual aspects and this relative dearth of modern cases makes a clear statement of the law harder to formulate than is desirable. The right of the master to dismiss his servant forthwith for disobedience is a good example of this and so the recent case of *Laws* v. *London Chronicle* (*Indicator Newspapers*), *Ltd.*[1] is a welcome addition to the reports. In this case the plaintiff was dismissed as a result of a single act of disobedience. She was an advertising representative and had gone with her immediate superior, the advertising manager, to a meeting at which the Chairman and managing director of her employers, the defendant company, was present. An altercation arose between the Chairman and the advertising manager and the latter withdrew from the meeting and invited the plaintiff to leave with him, which she did. The Chairman had forbidden her to go. As a result of this disobedience she was dismissed and she successfully recovered £45 for wrongful dismissal in the county court. The award was upheld upon appeal.

The problem to be determined is the quality and quantity of disobedience that will justify dismissal. As a large number of precedents were established in the early nineteenth century it is to be expected that they appear somewhat harsh towards the servant. Paramount amongst these is *Turner* v. *Mason*[2] where a domestic servant, against orders, left her employer's house for the night to visit her mother who was dangerously ill. The judgments in this case indicate that the decision turned upon the answer to two questions: was the order lawful? was it wilfully disobeyed? This had also been the ratio of earlier cases: *Spain* v. *Arnott*,[3] where a servant, ordered to do an errand in his dinner hour, refused, *Amor* v. *Fearon*,[4] where a servant pretended that he was a partner of his employer and *Callo* v. *Bouncker*,[5] where a personal servant's sulkiness and neglect to answer summonses was held not to be wilful. It was not until later

[1] [1959] 1 W.L.R. 698; [1959] 2 All E.R. 285.
[2] (1845) 14 M. & W. 112.
[3] (1817) 2 Stark. 256.
[4] (1839) 9 Ad. & E. 548.
[5] (1831) 4 C. & P. 518.

in the century that the idea of breach of contract or repudiation of contract by the servant came to be regarded as the basis of this type of case. So in *Edwards* v. *Levy* [6] the jury was charged to decide whether the plaintiff was "guilty of such insulting and insubordinate conduct as to be incompatible with the continuance of the relationship subsisting between him and the defendant," and in *Proctor* v. *Bacon* [7] it was said that the misconduct had to be so serious as to be inconsistent with the relationship of master and servant. By the time the rules as to wrongful dismissal came to be reviewed by McCardie J. in *Re Rubel Bronze Metal Co.* v. *Vos* [8] the idea of breach of contract was established as a firm basis of the rules. Both McCardie J. in that case and Lord Evershed M.R. in *Laws*' case looked back on the older cases and interpreted them as based on acts breaking the contract of service. There is little doubt that this is justifiable rationalisation although it is equally clear that the earlier judges were thinking in terms of status rather than contract. Phrases such as "the question really comes to this, whether the master or servant is to have the superior authority" [9] and "wilful disobedience of any lawful order is a good cause of discharge," [10] as well as the exceptions allowed as a defence to the servant: danger to life or person and exposure to infectious disease,[11] underline this point.

Laws' case is notable then in that it has once again affirmed that decisions of this type are to be reached by an application of the normal rules of contract. The decision itself, in which a servant wilfully disobeyed what was clearly a lawful and superior command, is contrary to the earliest cases but it reflects the modern approach to the relationship of master and servant. The bridge between the old and the new approach has been the need for "wilful" disobedience. The former inquiry whether the authority of the master had suffered has changed to the present test whether the act indicates a fundamental breach of the contract of service. The question whether one act alone is enough has become unimportant and dicta such as that of Lord James in *Clouston & Co.* v. *Corry* [12] that it is "clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature" and of Hill J. in *Edwards* v. *Levy* [13] that "a single act of insolence . . . would hardly justify dismissal" do not now represent a satisfactory approach. Both these cases were decided upon the ground that a certain standard of conduct

[6] (1860) 2 F. & F. 93, 97.
[7] (1886) 2 T.L.R. 845.
[8] [1913] 1 K.B. 315.
[9] *Per* Lord Ellenborough in *Spain* v. *Arnott* (1817) 2 Stark. 256, 258.
[10] *Per* Parke B. in *Turner* v. *Mason* (1845) 14 M. & W. 112, 116.
[11] *Ibid.*, *per* Alderson B. at p. 118. Rolfe B. pointed out that orders involving such situations were illegal and need not be obeyed anyway.
[12] [1906] A.C. 122, 129.
[13] (1860) 2 F. & F. 93, 95.

has to be reached that is inconsistent with the continuance of the contract of employment. Only then is dismissal justified. There can be little doubt that this provides a formula flexible enough to be readily applicable to all particular cases as well as to meet, if necessary, changing social conditions.

It is to be regretted that the implication which is clear in *Laws'* case that the normal rules of contract apply to this field cannot be said, without doubt, to apply overall. It is, for instance, well settled law that where a servant has given cause for immediate dismissal by misconduct he cannot successfully claim for wrongful dismissal where the employer ends his contract for a reason which is, of itself, insufficient.[14] The prior misconduct acts as a bar to his action. This does not seem in accord with the general law of contract [15] and it is to be hoped that *Laws'* case will be supplemented by other cases applying the general position to such situations.

J. C. Wood.

Scope of the Building Regulations

The decision in *Herbert* v. *Harold Shaw, Ltd.*[1] does not depart from the previous line of authority on persons benefiting under the Factories Acts.[2] Yet it is significant in illustrating, once again, the conflict between the approach to the Acts as criminal statutes, and the broad and sympathetic treatment essential for the proper implementation of these Acts as a mainstay of safety in industry.

The often-quoted remarks of Lord Simonds in *L.N.E.R.* v. *Berriman* [3] instance the strict approach; those of Lord Shaw of Dunfermline in *Black* v. *The Fife Coal Co., Ltd.*[4] and of Lord Porter in *Harrison* v. *N.C.B.*[5] instance what has been called the "workers' charter" approach.

The learned editor of the *Law Quarterly Review* has stressed [6] the importance of the Factories Acts receiving the most helpful treatment in the courts; the decision in *Herbert* shows how difficult this may be within the existing canons of interpretation.

The case arose in the building industry, which is organised in a way which sometimes makes the application of safety legislation difficult, as the instant decision illustrates. In many building operations, the "occupier" of the site will not be the employer of

[14] *Mercer* v. *Whall* (1845) 5 Q.B. 447; *Willetts* v. *Green* (1850) 3 Car. & K. 59; *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339.
[15] *e.g.*, the implication of *Bell* v. *Lever Bros.* [1932] A.C. 161 that a contract of value survives.
[1] [1959] 2 All E.R. 189; [1959] 2 W.L.R. 681.
[2] Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), and Factories Act, 1948 (11 & 12 Geo. 6, c. 55)—referred to in this note as "the Acts."
[3] [1946] A.C. 278, 313–314.
[4] [1912] A.C. 149, 179.
[5] [1951] 1 All E.R. 1102, 1107.
[6] (1951) 67 L.Q.R. 7.

the majority of workmen from time to time engaged in the operations. It is usual for different stages of the work, such as flooring, heating or painting, to be put out to specialist sub-contractors, who in their turn may let out parts of the work to "labour only" sub-contractors, who may work on their own, or possibly employ a few men. Apart from the advantages of independence, these "labour only" sub-contractors enjoy tax advantages under Schedule D.

The practice of elaborate sub-contracting is, of course, not confined to the building industry, being equally common in civil engineering, and is occasionally found in factories. It is with the building trade, however, that this note is concerned.

The plaintiff, Herbert, was engaged in fixing asbestos sheets to the roof of a shed, when he slipped and fell to the ground. The shed was being erected by Harold Shaw, Ltd., the defendants in this case. On the day of the accident, Herbert failed to obtain the plank which he considered necessary for his safety on the roof.

For five years before the accident, the plaintiff had worked exclusively for the defendants, but he was regarded, and regarded himself, as a man running his own business. He paid and engaged any labour he required, and passed on the cost. Sometimes he was paid by the hour, sometimes by the job, but he was always treated, for national insurance purposes, as a self-employed person, and was assessed for tax accordingly.

The normal practice was for him to provide his own tools, and for Shaw's to make arrangements for the supply of the necessary safety devices and other equipment from the main contractors.

The plaintiff based his action against the defendants on breaches of Regulations 4 and 31 of the Building Regulations.[7] Regulation 4 requires every contractor and employer of workmen who is undertaking roofing operations to comply with Regulation 31 which requires suitable precautions to prevent workmen falling from roofs.

Streatfeild J., sitting at Nottingham, held that there had been no non-compliance with the Building Regulations; he went on to hold that, as the plaintiff was an independent contractor, no duty was owed to him under the Regulations.

The decision was upheld by the Court of Appeal (Hodson, Romer and Pearce L.JJ.) on the ground that the plaintiff was an independent contractor, and as such outside the benefit and protection of the Regulations. *Per* Hodson L.J.:

> "The contract was essentially not a contract for work, but a contract for the results of the work . . . a perfectly straightforward contract between independent contractors, and no question of employer and employee, or master and servant, arises."[8]

[7] The Building (Safety, Health and Welfare) Regulations, 1948, No. 1145, made under sections 46, 60 and 107 of the Factories Acts, 1937.

[8] [1959] 2 W.L.R., at p. 685.

The basis of their Lordships' decision is clear. The right to found on a breach of statutory duty is dependent upon the plaintiff establishing, *inter alia*, that the particular duty is imposed for his benefit. The persons entitled to benefit under the Acts [9] can only be discovered by a careful reading of the provisions of the Acts. It appears that their protection is not specifically limited to any particular classes of persons. Many of the requirements and prohibitions are unqualified,[10] while others concern themselves with the safety of "persons," [11] "persons employed," [12] or "persons employed or working." [13] Section 60 of the Act empowers the Minister of Labour to formulate regulations to promote safety in processes involving special risks to "persons employed." It was under this power that the Building Regulations were made.

In considering the application of Regulations made under the Acts, two principles [14] formulated may be applied, *viz.*:

> "(i) Regulations cannot lawfully be made in favour of persons outside the class of persons for whose benefit Parliament authorised the making of the Regulations;
> (ii) If the Regulations themselves define the class of persons benefited, then the Regulations cannot benefit persons outside that class even though they may fall within a wider class in favour of whom the Secretary of State had the authority of Parliament to make the Regulations."

Thus, whosoever may be able to benefit under the Act itself, it appears that Regulations may only be made in favour of "persons employed" who are at risk from the particular process governed by the Regulations in question. Neither the Act nor the Building Regulations define "persons employed," and a consideration of the different terms used in the Act (*supra*) is not particularly helpful.

The courts at one time appeared to consider that the term was restricted to persons working under a contract of service with the occupier of the factory.[15] This seems too narrow a view of the scheme of the Act; *e.g.*, section 64 (3) contemplates that there may be an "actual employer" of persons employed who may be someone other than the occupier.

The opinion that the term covers employment in the factory by whomsoever, has lately been approved by the Court of Appeal.[16]

[9] The Acts apply to "factories" which term is extended under the scheme of the Acts, to apply to docks, building sites, shipyards, and works of engineering construction. See ss. 105, 106, 107, 108.

[10] ss. 22–25.

[11] ss. 18, 19, 26, 27.

[12] ss. 34, 41, 42, 43.

[13] ss. 12, 13, 14, 15.

[14] Formulated in Redgrave's *Factories, Shop and Truck Acts*, 19th ed., p. 562; approved by Viscount Kilmuir L.C. in *Canadian Pacific Steamships, Ltd.* v. *Bryers* [1957] 3 All E.R. 572, at 578–579.

[15] See *Hartley* v. *Mayoh & Co.* [1954] 1 All E.R. 375; also dicta of Omerod J. in *Stanton Ironworks Co., Ltd.* v. *Skipper* [1955] 3 All E.R. 544, at p. 547 (D.C.).

[16] *Massey-Harris-Ferguson (Manufacturing), Ltd.* v. *Piper* [1956] 2 All E.R. 722, *per* Goddard L.C.J. p. 726, Streatfeild J., p. 727 (D.C.), approved by C.A. in *Bryers* v. *Canadian Pacific Steamships, Ltd.* [1956] 3 All E.R. 560.

Terms are used within the Building Regulations that arguably cover a person who is not, strictly speaking, employed; *e.g.*, " person," " workmen," " occupants," " persons engaged "; but it will be recalled that these terms must be looked at within the ambit of the enabling power in section 60, and cannot of themselves widen the meaning of " persons employed."

Plaintiff's counsel argued strongly in favour of extending the meaning of " persons employed " by reference to the definition of " workman " in the Employers and Workmen Act, 1875.[17] This definition speaks of " . . . a contract of service or a contract personally to execute any work or labour " and has been interpreted to include persons who might be loosely described as self-employed.[18] The point is a fine one, as the decisions [19] on the other side of the line indicate. Although this statutory definition has been applied in other legislation, it has not, as Hodson L.J. pointed out,[20] been applied to the Acts, which do not make use of the term " workman."

Thus the Court of Appeal had no difficulty in deciding that Herbert was not a " person employed " within the widest meaning that the phrase had previously received. It is noteworthy that although any assistants employed by Herbert would be protected by the Regulations as " persons employed," [21] the court did not feel free to extend the same protection to Herbert, who ran the same risks as they did.[22]

The Court of Appeal's decision can only be assailed if one is prepared to argue against authority that " persons employed " has some meaning in the Act other than persons working under a contract of service with whomsoever.[23]

" Employed " might be considered as descriptive of the type of activity, that is, persons working, and therefore at risk in the factory, as opposed to visitors; but a similar argument has been disapproved.[24] [25]

Again, " employed " may be meant to include persons working under a contract which requires their presence in the factory. The wording of the Act is not wholly against this argument. Section 36 forbids the securing of the factory doors while persons are within " for the purpose of employment or meals . . . "; here " employment " appears to refer to work as opposed to mealbreaks. Section

17 38 & 39 Vic. c. 90, s. 10.
18 *Brown* v. *Butterley Coal Co.* (1885) 53 L.T. 964; *Grainger* v. *Ainsley* (1880) 6 Q.B.D. 182.
19 *Marrow* v. *Flimby and Broughton Moor Coal and Firebrick Co.* [1898] 2 Q.B. 588; *Squire* v. *Midland Lace Co.* [1905] 2 K.B. 448.
20 [1959] 2 W.L.R. at p. 684.
21 *Massey-Harris-Ferguson* (*Manufacturing*), *Ltd.* v. *Piper* (*supra*).
22 See *Bryers* v. *Canadian Pacific Steamships, Ltd.* (*supra*) for a case where Shipbuilding Regulations were extended to cover the ship's crew.
23 See note 16, *supra*.
24 By Wrottesley J. in *Weston* v. *L.C.C.* [1941] 1 All E.R. 555.
25 The earlier decision in *Hawkins* v. *Thames Stevedore Co., Ltd.* [1936] 2 All E.R. 472, which appears to support this contention, is now of doubtful authority.

104 applies the Act to institutions, including reformatories and workhouses, whose inmates can hardly be said to be working under a contract of employment. Nevertheless the section refers to the "employment of the inmates and other persons employed in the work carried on . . ."

Section 110 refers to outworkers. These are not necessarily "employed" by any particular firm. The section refers to "persons directly employed . . . either as workmen or as contractors, . . ." thus suggesting that a person may be "employed" under the section otherwise than under a contract of service.

On the other hand, there is the use in the Act of "employed or working,"[26] apparently referring to persons working in the factory and not considered to be included in "employed."

A careful reading of the Act does not reveal any plan apportioning protection between the different classes of persons at work in factories. It seems unwise, therefore, to draw firm conclusions from the words and phrases governing particular provisions.

There appear to be no cases in which this argument has been considered, but the opinions expressed in *Bryers* v. *Canadian Pacific Steamships, Ltd.*[27] give some indication of what the attitude of the courts might be.

In this case the power to make Regulations under section 79 of the Factories and Workshops Act, 1901,[28] was discussed. The section contained no words limiting the benefit of Regulations to any class of persons. Diplock J.,[29] and subsequently Singleton [30] and Jenkins L.JJ.,[31] were inclined to give the benefit of the Regulations to any person employed or working in the factory.

Parker L.J. thought that there must be "some limit," [32] which he set at persons employed in the factory, and Viscount Kilmuir [33] and Lord Tucker [34] agreed with him. No doubt an equally cautious view of the regulation-making power in the present Act would be taken if the question came before the House of Lords again, and it is difficult to see how a successful attack on the *Herbert* decision could be launched.

A consideration of the cases,[35] including *Herbert*, shows that as a result of the interpretations of section 60 discussed above, a distinction can be drawn between the protection offered by the Act, and by the Regulations. Thus the classes of persons benefiting

[26] In ss. 12–15.
[27] [1956] 3 All E.R. 242 (H.C.); [1956] 3 All E.R. 560 (C.A.); [1957] 3 All E.R. 572 (H.L.).
[28] 1 Edw. 7, c. 22—the predecessor of the present Acts.
[29] [1956] 3 All E.R. at 248.
[30] [1956] 3 All E.R. at 570.
[31] *Ibid.*, at 573.
[32] *Ibid.*, at 575.
[33] [1957] 3 All E.R. at 579.
[34] *Ibid.*, at 582–583.
[35] There has been no lack of decisions on the protection offered by the Act and Regulations, which for reasons of space cannot be discussed in this note.

under Act and Regulations are not identical. It is submitted that this distinction is undesirable for the following reasons:

1. Regulations have been held [36] to be in substitution for the provisions of the Act in some processes; thus the zeal of the Minister in making additional Regulations for safety may reduce the number of persons protected in a particular process.
2. Both Herbert [37] and his employees [38] would be protected under many of the provisions of the Act, but only his employees under the Building Regulations.[38] Thus a class of persons is excluded who need protection as they lack a widely experienced employer to take a detached view of their safety. A prudent contractor might reasonably be expected to take greater care of persons of Herbert's type than of the employees of an expert sub-contractor experienced in the risks likely to be met on widely differing sites.
3. The Act imposes duties upon labour in the interests of safety as well as conferring benefits. These duties are enforced by sections 119 and 130 (2). Under the Regulations, duties are generally [39] imposed upon "persons employed" only. The Building Regulations contain a number of these disciplinary provisions, the duty to comply with which is confined, by Regulation 4 to "persons employed." It is important to impose these duties upon building workers, owing to the temporary nature of the works and the difficulty of supervision. Yet it appears that workmen of Herbert's class would not be bound by them.

This class in the building industry is large and increasing, including skilled and semi-skilled trades. The trend toward "labour only" sub-contractors is favoured by many builders. If it continues, it seems that there will be an increasing number of workmen on building sites who will not be protected by the Regulations, or, apparently, bound by them. The high incidence of accidents on these sites should not allow us to view this development with complacency.

R. W. L. HOWELLS.

CATER *v.* ESSEX COUNTY COUNCIL

IN *Cater* v. *Essex C.C.*[1] the Divisional Court refused to assume a legislative function and had in consequence reluctantly to drive a

[36] Opinion of House of Lords in *John Summers & Sons, Ltd.* v. *Frost* [1955] 1 All E.R. 870.
[37] *Lavender* v. *Diamints, Ltd.* [1949] 1 All E.R. 532.
[38] *Massey-Harris-Ferguson* (*Manufacturing*), *Ltd.* v. *Piper* (*supra*).
[39] *e.g.*, in Woodworking Machinery Regulations (S.R. & O. 1922, No. 1196);
Shipbuilding Regulations (S.R. & O. 1931, No. 133);
Celluloid Regulations (S.R. & O. 1921, No. 1825);
Chemical Works Regulations (S.R. & O. 1922, No. 731);
—but section 60 (2) empowers the Minister to impose duties on "employed persons and other persons."
[1] [1959] 2 W.L.R. 739; [1959] 2 All E.R 213.

coach and horses through the enforcement provisions of the Town and Country Planning Act, 1947. Fortunately the decision is now of interest only as being one of those few cases which have provoked an immediate reaction from Parliament.

An enforcement notice can be served by a local planning authority either where development has occurred " without the grant of permission required in that behalf under [Part III of the 1947 Act]," or where " any conditions subject to which . . . permission was granted in respect of any development have not been complied with." [2] In *Francis* v. *Yiewsley and West Drayton U.D.C.*[3] the Court of Appeal held that an enforcement notice was a nullity if it recited that development had been carried out " without the grant of permission " when permission had in fact been granted albeit retrospectively and for a period which had expired.[4] The majority of the court carefully refrained from expressing any view on the validity of a notice which recited that permission had not been granted in respect of development to which the Town and Country Planning General Development Order, 1950,[5] applies. The validity of such a notice fell for decision in the present case.

The General Development Order was made under section 13 (1) of the 1947 Act which empowers the Minister (*inter alia*) to grant by order blanket permission for such development as may be specified in the order. Amongst the types of development specified in the Order is the " use of land . . . for any purpose on not more than twenty-eight days in total in any calendar year." [6] This grant of permission for temporary user is of general application, although it (in common with the other grants in the Order) may be withdrawn in particular cases or areas by a direction made or approved by the Minister.[7]

In the present case the developer had used land as a caravan site over a long period without obtaining express permission from either the local planning authority or (on appeal) the Minister. An enforcement notice was served which recited that development had been carried out without the grant of permission. In proceedings founded on that notice the developer took the point (" a point of no merit " [8]) that the notice was a nullity because its recital was inaccurate by reason of the twenty-eight day permission automatically granted by the General Development Order. The developer's argument was upheld by the Divisional Court whose only substantial task in the light of the *Yiewsley and West Drayton U.D.C.* case was to determine whether in a case to which the General Development Order applies there has been a grant of permission

[2] Town and Country Planning Act, 1947, s. 23 (1).
[3] [1958] 1 Q.B. 478.
[4] The notice should have recited the breach of a condition.
[5] S.I. 1950, No. 728.
[6] Art. 3 (1), Sched. I, Class IV, 2.
[7] Art. 4.
[8] [1959] 2 W.L.R. at p. 746, *per* Parker C.J.

within the meaning of the enforcement sections of the 1947 Act. As a matter of construction the affirmative answer achieved by the court is irresistible, and the court did not feel able to " avoid the result which . . . Parliament could [never] have intended " [9] by " rewriting a considerable number of sections in an Act of Parliament." [10] However the effect of the decision on the powers of local planning authorities in respect of illicit changes of use was disastrous, because unless the temporary permission granted by the General Development Order could be treated as a conditional permission it would be impossible to frame a valid enforcement notice in areas where the Order was in operation. If the temporary permission could be treated as a permission subject to the conditions that the use should cease after twenty-eight days a notice could rest on breach of condition if the use continued for a longer period, but Parker C.J. found it unnecessary to express any final opinion on the point [11] and it is not free from difficulty. As soon appeared, the Government's advisers took the view that the breach of condition argument was not a sufficient buttress for the large number of potentially affected notices.

The decision of the Divisional Court was given on April 14, 1959, and on June 22 the Lord Chancellor initiated a remedy by moving a new clause to the Town and Country Planning Bill which was then in the Report stage in the House of Lords.[12] The short effect of the clause (now section 38 of the Act [13]) was to equate a limitation attached to a permission granted by a development order to a condition attached to an ordinary planning consent, so that in future [14] enforcement notices in cases such as the present will rest on non-compliance with a limitation subject to which permission was granted. The remedy has been effective and speedy, but local authorities may wonder why the Government did not take the same opportunity to eliminate some of the other problems which have gathered around the enforcement provisions of the 1947 Act.

Michael Mann.

Civil Sanctions for the Repression of Crimes

There was a time when actions were not infrequently brought by the Attorney-General, suing either *ex proprio motu* or at the relation of private individuals, to restrain public authorities from exceeding

[9] *Ibid.*, at p. 748, *per* Donovan J.
[10] *Ibid.*, at p. 747, *per* Parker C.J.
[11] *Ibid.*, at p. 747.
[12] House of Lords Official Report, Vol. 217, cols. 32–35.
[13] See also s. 58 and Sched. VII.
[14] As originally introduced by the Lord Chancellor the section contained provisions (in effect) saving notices served before the commencement of the Act. These provisions were deleted when the Lords amendments were considered in the Commons. (House of Commons Official Report, Vol. 608, cols. 1728–1741. July 9, 1959.)

their powers. For reasons that are far from obvious, proceedings of this character are now extremely rare. However, there has recently been a revival of relator actions initiated by, instead of against, public authorities, and instituted for a different purpose—to secure observance of the criminal law by a person who has committed a succession of similar statutory offences. That the Attorney-General has *locus standi* to sue on behalf of the public for an injunction to restrain the invasion of a public right, notwithstanding the existence of an alternative criminal remedy, is well settled. Not every breach of the criminal law justifies the Attorney-General's intervention, but the courts, while refraining from giving countenance to the view that the Attorney-General is entitled to an injunction as of right, have been disinclined either to lay down the limits of their own jurisdiction in such matters or to specify the circumstances in which they will refuse to exercise their discretion in the Attorney-General's favour.

In practice relator actions brought by the Attorney-General for this purpose have usually ended in his favour. Thus, he has obtained injunctions to restrain continuing contraventions of building restrictions,[1] the persistent operation of passenger road services without a licence,[2] and repeated breaches of town planning provisions by the owners and lessees of caravan sites.[3] In most of the cases the courts have readily assumed that the defendants, by committing public wrongs, have invaded public rights which the Attorney-General can properly vindicate; and there have been strong dicta to the effect that the question whether the defendants' conduct has in fact caused or tended to cause injury to the public is not one into which they can properly inquire. It could reasonably be inferred from the recent caravan cases, *Att.-Gen.* v. *Bastow* and *Att.-Gen.* v. *Smith*,[4] that only in exceptional circumstances would the Attorney-General be refused an injunction where clear and persistent contraventions of a penal statute enacted for the public benefit had been established, even though the sanctions of the criminal law might not have been fully exhausted.[5] The decision of Salmon J. in *Att.-Gen.* v. *Harris* [6] now suggests that prospective relators should guard against over-optimism in predicting the outcome of such proceedings.

The defendants were flower-sellers who plied their trade on Sundays from stalls placed on a footway outside a Manchester cemetery. By so doing they were committing offences against the Manchester Police Regulation Act, 1844, which prescribed a

[1] *Att.-Gen.* v. *Ashborne Recreation Ground Co.* [1903] 1 Ch. 101; *Att.-Gen.* v. *Wimbledon House Estate Co.* [1904] 2 Ch. 34.
[2] *Att.-Gen.* v. *Sharp* [1931] 1 Ch. 121; *Att.-Gen.* v. *Premier Line, Ltd.* [1932] 1 Ch. 303.
[3] *Att.-Gen.* v. *Bastow* [1957] 1 Q.B. 514; *Att.-Gen.* v. *Smith* [1958] 2 Q.B. 173.
[4] See note 3, *ante*.
[5] See my *Judicial Review of Administrative Action*, 347.
[6] [1959] 2 All E.R. 393; also reported [1959] 3 W.L.R. 205.

maximum penalty of forty shillings. After their activities had gone on for some time, prosecutions were brought against them, apparently in consequence of representations made by the owners of flower-shops nearby. They were convicted and fined on no fewer than 189 occasions in all, but in a number of cases only a nominal fine was imposed. Eventually the local authority approached the Attorney-General who consented to bring a relator action for an injunction to restrain the defendants from their unlawful conduct. Salmon J., in the course of a reserved judgment, held (i) that the technical obstruction committed by the defendants did not incommode anyone using the footway and did not amount to a nuisance; (ii) that the defendants' conduct had neither injured nor tended to injure the public; (iii) that the court was therefore entitled to exercise its discretion in relation to all the circumstances of the case without being influenced by the fact that the Attorney-General had decided that to sue for an injunction was the most appropriate method of enforcing the law [7]; and (iv) that although the sanctions of the criminal law had proved ineffective, an injunction ought to be refused in view of the triviality of the acts complained of and the absence of injury to the public. Only in the most exceptional circumstances could any statutory provision be contravened without public injury, but this was an exceptional case. His Lordship went on to express his uneasiness about the circumstances in which the prosecutions had originally been launched.

The decision is to be welcomed both in relation to the particular facts of the case and on wider grounds. Although it is substantially on all fours with one earlier case,[8] it is not easily reconcilable with other decisions in which absence of proof of injury to the public has been treated as irrelevant; and his Lordship's observation that "it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public" [9] probably goes too far unless it is to be read as meaning that proof of the absence of any injury or tendency to cause injury to the public will enlarge the scope of the court's discretion. But it is important that potential limits should be set to this class of relator action, even if those limits are loosely defined. It may well be said that there are cases where it is undoubtedly desirable for the Attorney-General to vindicate the public interest by this form of proceeding. Persistent disregard of a penal statute may cause serious injury or inconvenience, and the offender should not be able to defy the law because he is able to pay a series of small fines, any more than a trespasser or libeller

[7] Distinguishing *Att.-Gen.* v. *Bastow* (where Devlin J. described the Attorney-General's decision to sue for an injunction as an "administrative discretion" and said that his application should be refused only in exceptional circumstances) on the ground that in that case the defendant's acts had indubitably tended to injure the public.

[8] *Att.-Gen.* v. *Kerr and Ball* (1915) 79 J.P. 51.

[9] [1959] 2 All E.R. 393, at 398.

should be able to buy his freedom to commit torts. However, the private law analogy is not altogether apt; it is always open to Parliament to increase the maximum penalty for a crime. And one must not overlook the fact that disobedience to an injunction may lead to a sentence of imprisonment of indefinite duration imposed in the absence of the safeguards that characterise criminal proceedings. If the reason why a persistent offender has not been deterred is merely that the criminal courts have failed to impose the maximum penalty, it is inappropriate to circumvent them by going to a civil court.

There is a place for the Attorney-General's action for an injunction to reinforce the sanctions of the criminal law; but it should be confined to serious cases of manifest urgency. In so far as *Att.-Gen.* v. *Harris* expresses a disinclination on the part of the civil courts to defer to the Attorney-General's opinion of what is, in this context, requisite in the public interest, it stands as a useful corrective to recent trends in other directions.

S. A. de Smith.

The Case of the Misguided Missile

With a simplicity that is rare in law reports *Fowler* v. *Lanning* [1] has re-opened (and closed?) an academic issue which has been long debated. The plaintiff issued a writ claiming damages from the defendant for trespass to the person and by his statement of claim succinctly alleged that " on November 19, 1957 at Vinyard Farm, Corfe Castle, in the County of Dorset the defendant shot the plaintiff. By reason of the premises the plaintiff sustained personal injuries " particulars of which were given. That was all. In fact the accident occurred at a shooting party. The defendant delivered a defence traversing the plaintiff's allegation of fact and objecting " that the statement of claim is bad in law and disclosed no cause of action against him on the ground that the plaintiff does not allege that the said shooting was either intentional or negligent." Under R.S.C., Ord. 25, r. 2, the defendant's objection came before Diplock J. as a preliminary point of law.

There have been two main points of controversy concerning the tort of trespass to the person (and, indeed, to goods and land) which may be presented by posing two questions:

(1) Is the tort of trespass to the person a tort of strict liability?
(2) If it is not a tort of strict liability, is the burden upon the plaintiff or the defendant to prove or disprove the necessary mental element?

As to the first question Diplock J. had no hesitation in stating that the tort is not one of strict liability. In spite of the obscure origins of trespass to the person and the medieval reluctance and

[1] [1959] 1 Q.B. 426; [1959] 2 W.L.R. 241; [1959] 1 All E.R. 290.

seeming inability to prove the appropriate mental element it is certain that trespass to the person now only lies for a direct intentional or negligent act; it does not lie if the injury is caused by inevitable accident (*i.e.*, an unintentional non-negligent act, even though direct). Thus the vigorous and highly persuasive views of the "extremists" [2] have again been denied. Diplock J. made the point concisely:

> "It is fashionable today to regard trespass to the person as representing the historic principle that every man acts at his peril and is liable for all the consequences of his acts; negligence as representing the more modern view that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others . . . But however true this may have been of trespass in medieval times—and I respectfully doubt whether it ever was—the strict principle that every man acts at his peril was not applied in the case of trespass to the person even as long ago as 1617." [3]

Thus the torts of trespass to the person and negligence require the same mental element. Few will today disagree with this principle,[4] and, indeed, the remarks of Diplock J. were not strictly necessary since both parties were agreed on this point.

The second question concerning the burden of proof was the important part of the case. To answer this properly it was necessary to discuss the old forms of action and particularly the historical distinctions between trespass *vi et armis* and trespass on the case. There was no difficulty in establishing that in trespass on the case and its modern descendant, the tort of negligence, the onus of proving intention or (more often) negligence rests upon the plaintiff. But was this true also of the earlier action of trespass *vi et armis*? There is a line of judicial authority (*Fletcher* v. *Rylands*,[5] *Holmes* v. *Mather*,[6] *River Wear Commissioners* v. *Adamson*,[7] *Gayler and Pope* v. *Davies* [8]) which suggests that the burden of proof in cases of trespass is upon the plaintiff. However, these cases have also provided authority for contending that in cases of trespass to the person, goods or land there is a special rule relating to highways which stems from a basic principle that since a person on or adjoining a highway consents to run the risk of accidental harm, it is for him to prove that the harm caused was not pure accident but arose from negligence. (This is really part of a wider argument that the general principles in the law of torts are often modified in cases concerning the highway.) Diplock J. was faced by an army of academic opinion which stated that although in negligence and in cases of trespass on

2 See Pollock on *Torts*, 15th ed., 128, criticising *Stanley* v. *Powell* [1891] 1 Q.B. 86; Gold, *Bell Yard* (1938), 5.
3 [1959] 1 Q.B. 432–433.
4 *Sed quaere* the position of trespass to land.
5 (1866) L.R. 1 Ex. 265, 286.
6 (1875) L.R. 10 Ex. 261.
7 (1876) 2 App.Cas. 743.
8 [1924] 2 K.B. 75.

the highway the burden of proof is upon the plaintiff, in other cases of trespass to the person it is for the defendant to prove affirmatively that he was not negligent. All the plaintiff need prove is the physical act of trespass.[9] Undaunted, the learned judge refused to accept that the old cases provided any binding judicial authority for saying that in cases of trespass to the person there is a distinction between highway and non-highway cases. If everybody accepts that in the case of an unintentional [10] trespass to the person on a highway the onus of proving negligence lies on the plaintiff, then the same rule applies to unintentional trespass to the person not committed on the highway. "If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (*i.e.*, injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples." [11]

If *Fowler* v. *Lanning* is to be accepted, there is now no distinction between negligence and trespass to the person with regard to the burden of proof. It rests on the plaintiff in each case. It is respectfully submitted that this conclusion is sound, and although the decision is one of first instance only the judgment is so carefully presented that one feels that it will be very difficult for a later court to disagree with it.[12] Further, the case is supported by *Walmsley* v. *Humenick*,[13] a decision of the Supreme Court of British Columbia, where again all the authorities were very carefully considered.

If the modern law of torts is to escape completely from the shackles of the old forms of action, then it is necessary to get away from the idea that each tort has its own peculiar rules, whether it be burden of proof or the nature of the defence or some other rule. This is particularly necessary when two or more torts overlap and can apply to the same set of facts. The plaintiff personally is not concerned at all as to which tort or torts he can use; he is merely anxious to establish that the act was tortious and that he can recover compensation. The trend towards a limited general theory of liability in tort

[9] See Salmond on *Torts*, 12th ed., 311; Winfield on *Torts*, 6th ed., 248–249; Clerk and Lindsell on *Torts*, 11th ed., 51–52; Fleming, *Law of Torts* (1957), 26; Winfield and Goodhart, "Trespass and Negligence" (1933) 49 L.Q.R. 369–370. Street, *The Law of Torts* (1955), 14–15, leaves the point open. See now 2nd ed. (1959), 15.

[10] Diplock J. occasionally uses the word "involuntary" but this often has the connotation of "uncontrollable" which is obviously not relevant here.

[11] [1959] 1 Q.B. 439.

[12] See also *National Coal Board* v. *Evans* [1951] 2 K.B. 861, 875, *per* Cohen L.J.

[13] [1954] 2 D.L.R. 232.

is apparent from the steady increase in the capacity of negligence. It is certain that in the absence of legislation there never will be a general theory of tort liability, merely a series of torts,[14] but if the torts which overlap on certain fact situations can be made to have fairly uniform rules, then although one cannot escape completely from the influence of the abolished forms of action at least it will be possible to escape some of its undesirable effects.

That is not to say that *Fowler* v. *Lanning* has done very much to coalesce the rules of trespass to the person and negligence. It is, however, a step in the right direction. There are still important differences between the torts. The main historical distinction between trespass and case, that trespass only lies for a direct act although negligence is available both for direct and indirect acts, is still vital. *Res ipsa loquitur* applies to negligence but not to trespass. The effect of this can be seen in *Gayler and Pope* v. *Davies* [15] where the plaintiff was unable to succeed in trespass since he could not prove negligence but was able to succeed in negligence since *res ipsa loquitur* applied. Is this distinction justified? Diplock J. in *Fowler* v. *Lanning* left open the point whether, had the plaintiff by his statement of claim set out the detailed facts without mentioning negligence, the court would have been free to deal with the tort of negligence and so be in a position to invoke the doctrine of *res ipsa loquitur*, if applicable. If this can be done, then it is in keeping with the suggested desirable trend and may help negative the distinction between trespass and negligence so far as *res ipsa loquitur* is concerned. Other distinctions, for example, whether vicarious liability applies to trespass [16] and the question of trespass being actionable *per se*, are not directly relevant here, although of interest in the argument concerning the present effect of the abolished forms of action.

In *Fowler* v. *Lanning* Diplock J. expressed anxiety in deciding the difficult preliminary point of law lest he might ultimately learn that "just as in *Donoghue* v. *Stevenson* [17] there was in fact no mouse in the ginger beer bottle,[18] so in this case there was in fact no pellet in the defendant's gun." It is interesting, therefore, to learn what did in fact ensue. At Dorset Assizes Streatfeild J. decided that although there were pellets in the guns of the defendant and also in the guns of other members of the shooting party, he was unable on the evidence to say that it was the defendant's shot which caused the injury.[19] It seemed to the learned judge that it was at least as likely—indeed on the balance of probabilities it was more likely—that the shot

[14] For a recent example see *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45.
[15] [1924] 2 K.B. 75.
[16] See *Sharrod* v. *L. & N.W. Ry.* (1849) 4 Ex. 580; *Esso Petroleum Co.* v. *Southport Corpn.* [1956] A.C. 218, 244, *per* Lord Tucker. *Cf.* Newark (1956) 19 M.L.R. 320.
[17] [1932] A.C. 562.
[18] As to which see (1959) 75 L.Q.R. 161.
[19] See *The Times*, May 21 and 22, 1959—which states that the action was for damages for negligence.

which caused the injury was one which another member of the party fired at a hen pheasant. In view of this decision it is interesting to speculate whether the plaintiff could now go one stage further and sue all the members of the shooting party for negligence even though he cannot pinpoint the actual culprit. It may well be that the burden of proof will then shift so that all the defendants will have to show they were not negligent.[20, 21]

Gerald Dworkin.

Presumption of Legitimacy and Blood Groups

On June 18, 1959, there was reported in *The Times* a case, *F.* v. *F.*, before a Divisional Court of the Probate, Divorce and Admiralty Division. In this the court was asked to decide on the legitimacy of a child whose mother was, during the period of conception, both cohabiting with her husband and committing adultery. It was admitted that the husband regularly used sheath contraceptives—but nothing was reported about the adulterer's practice: presumably he ignored such precautions. The Divisional Court, on appeal from the magistrates, held that the presumption of legitimacy had not been rebutted.

The court evidently felt able to reach a decision upon such biological imponderables so confidently as to be able to reverse the decision of a lower court. No doubt there are good legal precedents to shed light on such dark matters. But what is remarkable is that learned men and the expensive machinery of the law should all co-operate in a charade of guess-work when the parentage of this child was a matter of ascertainable fact, a matter of some fifteen minutes' work. All that was required was a drop of blood each from mother, child and one of the two men concerned; the result might appear more impressive if the blood of both men were used, but it is not always necessary. The failure to use blood-group evidence merits comment.

First, it may be held that blood-group tests are unreliable and not always productive of the critical evidence. A glance at the standard authority—Race and Sanger's *Blood Groups in Man*—would dispel that illusion. There are sufficient reliable hereditary blood-group characters to render parentage determination certain in all but a few cases, and the matter is put beyond doubt if the blood of all potential parents in a given case is examined.

[20] See *Roe* v. *Minister of Health* [1954] 2 Q.B. 66, 82, *per* Denning L.J. (*obiter*); *Cook* v. *Lewis* [1952] 1 D.L.R. 1—where the facts were similar.

[21] If the plaintiff commenced proceedings against the group it would be desirable for the defendant in *Fowler* v. *Lanning* to be joined as one of the co-defendants for Streatfeild J. could not say that the defendant did not shoot the plaintiff. In those circumstances the defendant might well set up *res judicata*. But see *Callow* v. *Jenkinson* (1851) 6 Ex. 666—judgment against defendant sued jointly with others not conclusive in subsequent proceedings between same plaintiff and same defendant alone. *Sed quaere.*

Secondly, the concept that a man's title to his own blood is absolute becomes increasingly difficult to maintain in an age of promiscuous blood transfusion and universal blood testing. And it must not be forgotten that there are two sides to a legal proceeding, so that the blood-group evidence that could be submitted by the parties to one side alone may suffice to determine the issue. To deny the admission of such evidence cannot make for justice.

Finally, there is the question of policy in respect of the infant's status. Clemency is a desideratum but it is an uncomfortable thought that in the dispensation of justice ascertainable fact can be ignored.

Fulton Roberts, m.d.

A Plea of Guilty in Later Civil Proceedings

From time to time a question has been raised as to the evidential force of a plea of guilty to a criminal charge in subsequent civil proceedings arising on the same facts. It will be recalled that in *Hollington* v. *Hewthorn* [1] Goddard L.J. (as he then was) referred to the problem in the following terms:

> "It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial."

Professor Cowen and Mr. Carter also adopt this approach [2] saying:

> "A conviction, following a plea of guilty, should not be so admissible. Such a conviction does not necessarily possess the high probative value which results from the circumstance of proof beyond reasonable doubt of the facts upon which the conviction is based. This inadmissibility *qua* conviction should, however, be without prejudice to admissibility *qua* admission and subject to the rules governing admissions." [3]

It seems clear that these suggestions that guilty pleas be treated as admissions in subsequent proceedings envisage that they be treated as informal admissions and therefore not conclusive, since Dr. Cross [4] and Professor Cowen and Mr. Carter [5] consider that the

1 [1943] K.B. 587, at 599-600.
2 *Essays on the Law of Evidence*, p. 204.
3 They cite in support of this suggestion *Moore* v. *Giofrelle* [1952] Argus L.R.C.N. iii, where there was no express plea of guilty but a failure to appear upon summons and a failure to apply for a rehearing upon conviction. This conduct was treated as tantamount to a plea of guilty. See also Cross on *Evidence*, p. 347 and Canadian authority there cited.
4 Cross on *Evidence*, p. 347.
5 *Essays on the Law of Evidence*, p. 203.

principal danger of admitting this kind of evidence is that it may be in effect treated as conclusive and Lord Goddard is cited as showing this fear.[6] However, there is not wanting a certain amount of authority for the proposition that such pleas are conclusive.

The point was raised in the Canadian case of *Cromarty* v. *Monteith*[7] where the facts in outline were that the plaintiff was a guest in the defendant's house and was assaulted by the defendant after molesting the defendant's wife. Subsequently the defendant pleaded guilty in a police court to a charge of assault causing actual bodily harm. Then the plaintiff brought civil proceedings and it was contended on his behalf that the defendant's guilty plea was a conclusive admission of guilt which precluded the civil court from hearing any evidence which might contradict it. Two Canadian cases were cited to Wilson J. sitting in the Supreme Court of British Columbia, dicta from which appeared to support this proposition. The cases were *Wesley* v. *Toronto General Insurance*[8] and *Ingles* v. *Sun Life Assurance Co.*[9] Wilson J., however, was able to find that these were not binding authority on this point. He then passed on to consider English dicta and textbook opinions at some length.[10]

> " In Phipson on *Evidence*[11] *R.* v. *Fontaine Moreau*[12] is cited as supporting this proposition: ' A pleads guilty to a crime and is convicted; the record of judgment upon this plea is admissible against him in a civil action, as a solemn judicial confession of the fact.'
>
> " Even the editors of *Phipson* can be fallible; a reading of the report relied on shows that the judgment contains no such statement of law and that, in fact, the circumstances of the case had no resemblance to those of the matter before me."

Wilson J. then went on to remark that the admissibility of a plea of guilty was discussed in *Fontaine Moreau* by Lord Denman C.J., Coleridge J. and counsel " why it is hard to say, because no plea of guilty was involved." Wilson J. continued by saying that Lord Denman referred to Phillips' *Digest of Evidence at Nisi Prius*[13] and that a footnote to the report showed that the opinion given in this book was that the plea of guilty was admissible but not conclusive. Wilson J. thought Lord Denman's view in the discussion was to the same effect[14] and did not support the statement in *Phipson* that a guilty plea is a " solemn judicial confession." Continuing his

[6] *Ibid.*, citing [1943] K.B. at p. 596.
[7] [1957] 8 D.L.R. (2d) 112.
[8] [1939] 3 D.L.R. 783 (affd. [1939] 4 D.L.R. 731).
[9] [1937] 1 D.L.R. 706 (affd. [1938] 3 D.L.R. 80).
[10] At pp. 133–114.
[11] 9th ed., p. 448.
[12] (1848) 11 Q.B. 1028, at p. 1033.
[13] Vol. I, 8th ed., p. 523.
[14] This seems mistaken. The words from *Phillips* upon which Wilson J. seems to rely are separated from Lord Denman's remarks by brackets in the Queen's Bench report of the case and would seem to be part of counsel's argument. Lord Denman thought a guilty plea admissible (*post*, n. 27) but it is not clear whether he thought it conclusive or not.

survey of textbook opinion, Wilson J. said that Roscoe's *Evidence in Civil Actions* [15] and the *English and Empire Digest* [16] correctly stated the effect of Lord Denman's opinion without adding *Phillips'* qualification as to the inconclusiveness of the guilty plea. The learned judge then cited Wigmore on *Evidence* [17] which says:

> "An accused's pleading in a criminal case, offered in a subsequent civil case would seem to be proper."

Wilson J. then concluded his examination of textbook authority in the following passage:

> "I think that Mr. Phillips has correctly stated the law. The plea of guilty is receivable in evidence as an admission against interest but it is not conclusive. It must be regarded as would any other admission by a litigant, and evidence of the circumstances under which it was made must be received in order to decide upon the weight to be attached to it. The fact that the admission has been made in a judicial proceeding is a factor to be considered, but any presumption which might arise from this circumstance might be rebutted by evidence, for instance, that the plea had been induced by fraud or threats. The defendant may also, I think, be heard in a subsequent civil trial, to say that the admission was made under a misapprehension of law. (Here he referred to Roscoe's *Evidence in Civil Actions* [18] and *Newton* v. *Liddiard*.[19]) But I think that once the admission is placed on record, it is incumbent upon the litigant to prove the existence of circumstances which detract from its apparent effect."

He then went on to find that in the case before him there was no suggestion of fraud, compulsion, inducement or mistake of law. In consequence he attached considerable weight to the admission of guilt, found that the force used by the defendant against the plaintiff was excessive in proportion to what might legitimately have been used in defence of the defendant's wife and therefore gave judgment for the plaintiff though without costs.

The rule thus formulated by Wilson J. seems eminently sensible and workable but a lurking doubt may remain as to whether he may not have been unduly harsh upon the editors of *Phipson* especially since he might also have cited Taylor on *Evidence* [20] for a proposition identical with that given in *Phipson*. In addition to *Fontaine Moreau*, *Taylor* cites an anonymous case [21] and *Bradley* v. *Bradley*.[22] *Taylor* also explicitly says that the admissibility of the record of judgment upon a plea of guilty is dependent upon the deliberate declaration

15 20th ed., p. 209.
16 Vol. 22, p. 270.
17 3rd ed., art. 1066.
18 20th ed., p. 65.
19 (1848) 12 Q.B. 925.
20 12th ed., pp. 1066–1067.
21 (1808) *per* Wood B. cited in Phillips on *Evidence* (8th ed., Vol. I, p. 523).
22 (1834) 2 Fairf. 367. (Fairfield. Maine 1833–35.)

and admission of a party and is to be treated according to the rules which govern admissions.

A fuller examination of *Fontaine Moreau* is therefore necessary. The facts of the case were that F. was indicted for falsely swearing that E. owed him £50. The dispute had been referred to a barrister as arbitrator and he found that nothing was owing from E. to F. At the criminal trial Lord Denman C.J. admitted this finding as evidence against F. and the correctness of this ruling was in question in the reported proceedings, the final decision being that the award was not admissible evidence. In the argument prior to judgment the question of the admissibility of guilty pleas in later civil proceedings was raised by counsel probably because that appeared to be an analogous case to the extent that it might seem that the decision of one tribunal was used as evidence in another. It is apparent from a comparison of the Queen's Bench and Jurist [23] reports that we have a rather garbled version of the exchanges on this point. The Jurist report appears to be the more satisfactory and is followed in this account of the argument. Lord Denman explained that he had admitted the award on the ground that the parties had agreed to be bound by the decision of the arbitration. Serjeant Shee then continued his argument by citing a long passage from Phillips on *Evidence* [24] in which it is said that old authorities [25] regarded a guilty plea as conclusive in later civil proceedings. Phillips himself says "it seems at least to be admissible." At this point in the textbook comes a footnote reference to the anonymous case of 1808. It was an action for assault and battery tried at Leicester Lent Assizes and was undefended but Wood B. suggested an objection to the admissibility of an earlier guilty plea and after consideration, admitted the record in evidence. Serjeant Shee then adds that it is stated in *Phillips* that on a subsequent occasion Lord Tenterden had ruled that such a guilty plea was not admissible. Coleridge J. reinforced this by a second-hand reference to *Phillips* through *Roscoe* [26] and it appears from the Queen's Bench report that Serjeant Shee attempted to find a practical justification for this exclusion of a plea of guilty in the suggestion that such a plea "is often a matter of arrangement, rather than an avowal of guilt." Lord Denman was, however, frankly incredulous. He said:

> "I do not believe that Lord Tenterden ever said that it was not evidence. If a man out of court admits an assault it would be evidence against him. How can it be, that if a man in court pleads guilty it is not evidence?" [27]

[23] (1848) 12 Jurist 626, at 627.

[24] 8th ed., Vol. I, p. 523. Serjeant Shee was arguing for the admissibility of the arbitrator's award and the point of his discussion seems to have been that guilty plea cases were instances of the determination of one tribunal being admissible in evidence against one of the parties in another tribunal.

[25] Lambard, *Eirenarcha or Office of Justice of the Peace*. Bk. 2, C. 9, p. 530 (ed. 1619), supported by Year Book citations.

[26] 4th ed., p. 120; (1848) 11 Q.B. at p. 1033.

[27] The exact wording is cited from (1848) 12 Jurist at p. 627.

This scepticism may be well-founded. If one turns to the relevant passage in *Phillips* [28] the text reads:

> "But if a person indicted for an assault plead guilty to the charge, the record has been considered to be conclusive against him in an action for damages for the same assault."

To that there is appended a footnote which reads:

> "The contrary has, however, been ruled by the present Lord Chief Justice at Nisi Prius."

It is clear that the main text refers primarily to conclusiveness and not to admissibility. Therefore the footnote would seem to mean that Lord Tenterden had ruled that a guilty plea was admissible but not conclusive. It follows that Serjeant Shee, *Roscoe* and Coleridge J. are in error and Lord Denman's doubts were well-founded. It also means that one English judicial opinion of tolerably modern vintage can be produced for the proposition that a guilty plea is not a conclusive admission.[28a] *Hollington* v. *Hewthorn*, as has been seen, does not in terms deal with this point, it is not clear from *Phillips*' references to the anonymous case at Leicester whether Wood B. expressed any view and in any case it would seem that he had no occasion to do so and, despite what was said by Wilson J. in *Cromarty* v. *Monteith*, it is clear that none of the judges in *R.* v. *Fontaine Moreau* committed himself to a definite stand.

On reading the relevant passages in *Phillips* [29] it seems clear that the author thought that at least a good case could have been made out for the conclusive character of a guilty plea but in this he was relying on *Lambard* and the Year Books and however important these may be for the historian, it is suggested that it may safely be hazarded that a modern court, when faced with this problem of evidence will be mindful of the adjuration in *United Australia* v. *Barclays Bank* [30] and pass on undeterred. That being so, *Cromarty* v. *Monteith* seems to give as satisfactory a rule as could be desired. Wilson J. may have been a little harsh on the editors of *Phipson* (the learned judge, as he says, was unable to refer to *Phillips* [31]) but the authority for the proposition which appears in *Phipson* and *Taylor* is hardly such as would carry any real weight with a modern court in such a branch of the law as Evidence.[32]

A. H. HUDSON.

[28] 7th ed., Vol. II, p. 203.

[28a] This view is taken in footnote (*a*) to 11 Q.B. at 1033.

[29] 7th ed., Vol. I, p. 338; Vol. II, p. 203, and references in note to *Fontaine Moreau* in 11 Q.B. at p. 1033.

[30] [1941] A.C. 1, at p. 29.

[31] [1957] 8 D.L.R. (2d) at p. 113.

[32] See also Cross on *Evidence*, p. 347 citing *English* v. *Richmond and Pulver* [1956] 3 D.L.R. (2d) 385 and *Ferris* v. *Monaham* [1956] 4 D.L.R. (2d) 539 where guilty pleas were held to be admissible but not conclusive. There was no discussion of *Fontaine Moreau* in these cases.

The Mountbatten Case: A Protest

The courts, intent on their rule-idolatry, still keep up the pretence that the consequences of their decisions are not important to them. Or, where they have to deal with the implications of a foreign judgment in England, they maintain that they should be oblivious to merits—and concerned only with empty jurisdictional formalities. Is there no social function to perform? Or is the prod of logic so inevitable?

Modern divorce problems are a good illustration. The courts—and many writers—insist that the delightfully fuzzy concept of domicile is controlling. Accept this as the "general rule" (assuming that one can identify domicile when one sees it) and, barring the odd exceptions, you have the criterion for decision. All, mark you, without any study of the alternatives to this inevitable decision, no attempt to sort out the social goals involved and, above all, not a glance at the reasonably predictable results of legal encounter. It is a process which is not only easy and satisfying to the deductive mind but is also completely lacking in any serious appreciation of legal purpose and the individual's expectation of fairness.

Mr. Higgins, in commenting on the recent case of *Mountbatten* v. *Mountbatten*,[1] has said that it did not "lay down any new principles regarding the recognition of foreign divorce decrees." I do not wish to argue the point. My concern is with how these "principles" acquired the right to be so immutable and what, if anything, they represent. I start with one important premise: that the courts are seldom forced to reach a conclusion unless they want to. To suggest that they are is not only a tacit insult to their imagination but also a complete denial of their power to mould the plasticine law into the likeness of some preferred model.

The implications of section 18 of the Matrimonial Causes Act have very little to do with domicile, residence, or any other such empty phrase. If a court is so minded, it can find domicile to exist in a matter of days (or hours?) if it can impute an intention to this effect; residence is much easier, for there need be no imaginary probing of human thoughts long since past. Section 18 is concerned with extending the range of people who can seek matrimonial relief in the English courts. It is not a matter of *attracting* litigants, as is the open revenue policy of some United States jurisdictions, but simply a recognition that there exists a dissatisfied group which would just as soon put an end to its married life. There is no guarantee of success, of course, but the implication is that, given adequate "grounds," the dissolution will follow. To this, we might add the gradual statutory extensions of the "grounds" in the course of the last century, the increasingly liberal interpretation of cruelty

[1] [1959] 2 W.L.R. 128; [1959] 1 All E.R. 99; noted by Mr. M. J. Higgins in (1959) 22 M.L.R., p. 318.

as a cause for dissolution,[2] the weakening of the insistence on corroboration,[3] the fantastic proportion of undefended divorce cases,[4] and we see the formation of some social and legal policy. I must leave the full study of divorce facilities in our changing society to another time: the bounds of a Note are not elastic enough. But I would like to suggest that, despite a lot of nonsensical insistence that we must preserve the institution of marriage *for its own sake* and pay no attention to claims of individual well-being and economic security,[5] English divorce laws and practices are by no means so unseeing. They are moving with growing impetus towards a recognition that the welfare of all the individuals involved is the community's basic concern.[6] If we can dignify anything in our divorce practices with the name of policy, then, this is it.

Turning to the recognition of foreign judgments, it is at once clear that to the extent that foreign decrees are accepted as valid, domestic policy is that much extended. Let me put this more persuasively. If an English court chooses to accept that an Argentinian decree based on incompatibility suffices to dissolve a marriage, then it implicitly accepts that there is nothing repugnant about incompatibility in English eyes, provided that it is confined to Argentina. A couple can be legally incompatible in Buenos Aires but not in Manchester. Domestic policies hardly suffer, of course, because it is hardly any inducement to Mancunians to visit Argentina, in the way that the recognition of Nevada and Florida decrees has made these states the Meccas of marriage-weary New Yorkers. By the same token, collusion is not objectionable if given the nod by the courts of Mexico,[7] or short-term residence if valid in the eyes of New South Wales,[8] Northern Ireland,[9] Finland,[10] Switzerland,[11] or Norway.[12] The last situation is even stronger, of course, for our internal procedural policy runs on similar lines. But why should these lines have to be mathematically similar? If it is our divorce policy to cut the partners loose where the welfare of the individuals demands it, why should we frown on another jurisdiction simply because it carries out the same policy in ninety days,[13] or in one day, as here? The drawing of these lines means a mental reservation—

2 See Allen, " Matrimonial Cruelty " (1957) 73 L.Q.R. 316 and 512.
3 *Cf.* the comments of Sachs J. in *Woodard* v. *Woodard* [1959] 1 All E.R. 641, 644, on the relaxed attitude towards the confessions.
4 At the last count, 91.1% of the cases were undefended: Civil Judicial Statistics, 1957, Table 11.
5 The late unlamented Royal Commission is the chief offender here.
6 England, of course, is not alone. Scandinavian countries, the U.S. and the Commonwealth countries (*cf.* the Report of last year's Cambridge Colloquia on Comparative Law (1959) 8 I.C.L.Q., at 392–393) are working on similar lines.
7 Davies J. [1959] 1 All E.R. at 104; *Crowe* v. *Crowe* [1937] 2 All E.R. 723, 725.
8 *Travers* v. *Holley* [1953] P. 246; [1953] 2 All E.R. 294.
9 *Carr* v. *Carr* [1955] 2 All E.R. 61.
10 *Arnold* v. *Arnold* [1957] P. 237; [1957] 1 All E.R. 570.
11 *Robinson-Scott* v. *Robinson-Scott* [1958] P. 71; [1957] 3 All E.R. 473.
12 *Manning* v. *Manning* [1958] P. 112; [1958] 1 All E.R. 291.
13 *Dunne* v. *Saban* [1955] P. 178; [1954] 3 All E.R. 586—a Florida decree.

and, in effect, a discrimination against the policy of the Mexican legislation.[14]

If, in *Mountbatten* v. *Mountbatten*, Mr. Justice Davies had chosen to accept the validity of the Mexican decree, the Law Courts would still have stood intact. What is more, he could easily have based his conclusion on a liberal reading of *Travers* v. *Holley*. My concern, as I have said before, is with the immediate results of his decision not to do so and with its complete failure to accomplish any particular purpose at all. The Mountbattens remain married in England, although they are divorced in Mexico and, presumably, anywhere in the United States they choose to raise the issue.[15] This despite the fact that they both wished to put an end to their married life, which had become distasteful to them and which only the Queen's Proctor and Mr. Justice Davies wished them to continue. Of their present whereabouts I know nothing. Presumably the Marquis is still in England and the Marchioness in the United States. If she were to remarry there and stay there, she would be perfectly safe. The Marquis, though, stands in grave danger of committing bigamy and producing illegitimate children if he wishes to marry again in England. With closer concentration on the function of domestic policy and on the whole purpose of reviewing foreign decrees, this would never have happened.

And all because New York only allows divorce for adultery . . . .

ALAN MILNER.

"UNITS" AND "CUSTOMARY FREIGHT UNITS" IN THE CARRIAGE OF GOODS BY SEA

Two recent decisions of the United States courts—*Gulf Italia Co.* v. *American Export Lines Inc.*[1] and *Pannell* v. *United States Lines Company*[2]—add to the list of authorities concerning the important question as to the method of assessing the maximum liability of shipowners in respect of the carriage of goods by sea. In this matter there has been a marked divergence between the words of the English statute, the Carriage of Goods by Sea Act, 1924, and its counterpart —the United States Carriage of Goods by Sea Act, 1936.

The Carriage of Goods by Sea Act, 1924, provides[3] that:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100[4] per package or unit, or the

[14] The most incisive criticism of such discrimination is still that by Justice Rutledge in *Williams* v. *North Carolina* (*No. 2*), 325 U.S. at 244 *et seq.*; 65 S.Ct. at 1101 *et seq.*

[15] Even in New York, although that state will only grant divorces to its year-long residents on the ground of adultery.

[1] (1959) 263 F. 2d 135. [2] (1959) 263 F. 2d 497.

[3] Sched., Art. IV, r. 5.

[4] The sum of £200 has been substituted by the British Maritime Law Association Agreement of August 1, 1950.

equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

No definition of the word "unit" is given in the English Act. Scrutton [5] suggests that "'Unit' probably means the unit of enumeration shown in the bill of lading as provided by Art. III, Rule 3 (*b*)." The rule referred to says that, on the demand of the shipper, the carrier or the master or agent of the carrier must issue a bill of lading showing among other things:

"Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper."

This view is also put forward by Temperley and Vaughan [6] who state that:

"a consignment described as '1,000 quarters of grain in bulk' would be composed of 1,000 units of measure. In practice, of course, the maximum liability of £100 [7] per unit would in such cases never be reached. This supports the view that the whole clause was primarily aimed at preventing excessive claims in respect of small packages of great value."

But they also put forward an alternative view to the following effect:

"The word 'unit' connotes one of a number of things rather than a thing standing by itself, and with reference to goods carried by ship, it does not seem appropriate to describe the whole of a cargo or parcel of cargoes in bulk. Further, the natural interpretation of the word 'unit' in the phrase 'package or unit' appears to be that it has been added in order to cover parts of cargo similar in a general way to a package, but not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word 'unit' has, it is suggested, been added in order to embrace such things and not to extend the scope of the rule to bulk cargoes or parts thereof. Moreover the whole purpose of Rule 5,[8] which is directed against excessive claims for things of undisclosed abnormal value supports this limited interpretation of the word."

An echo of this interpretation is to be found in the judgment of Goddard J. (as he then was) in *Studebaker Distributors, Ltd.* v. *Charlton Steam Shipping Co., Ltd.*,[9] where he observed [10]:

"If the shipowners desire that [the clause] should refer to any individual piece of cargo it would not be difficult to use

[5] *Charterparties* (16th ed., 1955), p. 490.
[6] *Carriage of Goods by Sea Act, 1924* (4th ed., 1932), p. 81.
[7] See footnote 4, *supra*.
[8] *Viz.*, Art. IV, r. 5.
[9] [1938] 1 K.B. 459.
[10] *Ibid.*, at p. 467.

appropriate words, as for instance, 'package or unit' to use the language of the Hague Rules."

Maclachan [11] adopts the view that the word means the unit of enumeration as provided by Art. III, r. 3 (*b*), and goes on to say:

> "In this way the rule can be made to apply equally well to a cargo of packages or to a homogeneous bulk cargo. Any other view leads to difficulties in case of bulk cargo; for a shipowner might only be liable in the sum of £100 [12] for a whole parcel or even a whole cargo in a case where the whole was damaged or lost."

On the other hand, the wording of the United States Carriage of Goods by Sea Act, 1936, s. 4 (5), is in these terms:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

In reviewing the history of this part of the enactment District Judge Chesnut in *The Bill* [13] said that in the United States the phrase "per unit" in the Hague Rules had been expanded or changed to read "per customary freight unit." There was considerable delay (1923–1936) before the legislation was passed. In the intervening years several successive Bills were introduced in which the phaseology of the limitation clause at times read "$100 per package or unit," "$500 per package or unit," "$500 per package, or in case of goods not shipped in packages per customary freight unit." Various hearings were held on these several Bills, and during them other varying phraseology was suggested from time to time by interested parties including among other phrases "per declared freight unit." There appeared to be no committee reports which clearly explained the phrase "per customary freight unit" which appeared in the Bill as finally passed but he considered that the phrase was intended to be more definite than the shorter phrase "per unit" contained in the Hague Rules.

Do the words "customary freight unit" mean the unit in which the type of cargo is customarily shipped? Or do they refer to the unit customarily employed in calculating the freight?

This question was considered in *The Bill*,[14] which was a case concerning the short delivery of a cargo of oil. The shipowners claimed that the "shipping unit" was one kilogram, and not 1,000 kilograms

[11] *Merchant Shipping* (7th ed., 1932), p. 381.
[12] See footnote 4, *supra*.
[13] (1944) 55 F.Supp. 780. (District Court of Maryland.)
[14] *Supra*.

as stated in the bill of lading in the calculation of the freight, and that their liability should be limited in the former basis accordingly. The learned judge held that this claim failed and observed [15]:

> " Upon consideration of this hitherto unadjudicated point, I conclude that the phrase ' per customary freight unit ' in this context in the light of its legislative history, refers to the unit of quantity, weight or measurement of the cargo customarily used for the calculation of the freight to be charged. Generally in marine contracts the word freight is used to denote remuneration or reward for carriage of goods by ship rather than the goods themselves."

This case was decided on June 8, 1944, but it was not the first that concerned the interpretation of the words " customary freight unit," for on February 28 of that year judgment had been given in *Stirnimann* v. *The San Diego* [16] in the District Court for the Southern District of New York. Here a giant amusement crane consisting of 126 parts was delivered in a badly damaged condition. The shipowners claimed to limit their liability to $500 on the ground that the words " freight unit " contemplated the crane as a whole, but this contention was rejected by the Court. District Judge Bright said [17]:

> " There does not seem to be any previous decision defining the meaning of the words. In the absence of any testimony as to the rate applied to the shipment or the manner in which the amount of the freight was arrived at, the words ' freight unit ' in my opinion, refer not to the entire shipment which was in 126 units or parts but to tons or separate pieces . . . The [shipper] may recover [his] damage, reasonably to be ascertained but not in excess of $500 as to any separate part scheduled in the bill of lading."

When this case went to appeal,[18] counsel for the shipowners contended that, as the freight was a lump sum, the shipper was only entitled to $500 on the authority of *The Bill* [19] which was cited to the court. The Circuit Court of Appeals, Second Circuit, rejected this argument on the ground that there was no indication as to how the figure on the bill of lading had been arrived at. The record showed that each piece of the crane was carefully weighed and measured and described in a schedule. It seemed reasonable to suppose that the weight and size of each piece were carefully and separately considered in arriving at the freight. The court below had held that each of the 126 pieces was a separate package or

[15] (1944) 55 F.Supp. 780, at p. 782. The question was considered only incidentally in *The Margaret Lykes* (1944) 57 F.Supp. 466, at 471, decided on July 31, 1944.

[16] (1944) 55 F.Supp. 798.

[17] *Ibid.*, at p. 800.

[18] (1945) 146 F. 2d 141.

[19] *Supra.*

freight unit, each being subject separately to the $500 limitation. This was a reasonable conclusion where there was no showing of a contrary custom in the light of the obvious purpose of the section, *viz.*, to prevent excessive claims in respect of small packages of great value,[20] but not to permit carriers to escape liability for just claims.

The passage from the judgment in *The Bill*[21] set out above was cited with approval in *Waterman S. S. Corporation* v. *United States Smelting and Refining Co.*[22] In that case 698 pieces of structural steel had been shipped in bulk and 13 pieces were lost overboard. The Circuit Court of Appeals, Fifth Circuit, did not regard each of them as a customary freight unit. Since the freight was charged at 64 cents per 100 pounds, that unit of measure was held to be the customary freight unit.

In *Middle East Agency Inc.* v. *The John B. Waterman*[23] the liability of a carrier of a tractor damaged because of unseaworthiness and improper stowage was held by the United States District Court for the Southern Division of New York to be limited to $4,270, *i.e.*, 8·54 freight units of 40 cubic feet each multiplied by $500, for this was the unit customarily employed.

In *Isbrandtsen Co. Inc.* v. *United States*[24] the United States Court of Appeals, Second Circuit, observed[25]:

> "The authorities have construed the words 'customary freight unit' to refer to the unit upon which the charge for freight is computed and not to the shipping unit."

But in that case, which concerned an unboxed locomotive and tender, the shipping unit and the unit for computing the freight charge were the same.

This case was followed by the same court in *Gulf Italia Co.* v. *American Export Lines Inc.*[26] where a tractor was damaged. The liability of the shipowners was held to be limited to $17,300, calculated on the basis of the customary freight unit, which amounted in the case of this type of vehicle to 34·6 units. Circuit Judge Moore, however, in a dissenting judgment, observed[27]:

> "Nor is there any reason for not regarding a tractor as a customary freight unit. The trial court could not 'believe that Congress intended the carrier to be able to limit its liability for its own negligence to a pittance of only $500.' However, had the [shippers] wished to obtain protection on an *ad valorem* basis [they] could have done so. Under the Act this

[20] Quoting Temperley and Vaughan, *op. cit.*, p. 82.
[21] *Supra.*
[22] (1946) 155 F. 2d 687.
[23] (1949) 86 F.Supp. 487.
[24] (1953) 201 F. 2d 281.
[25] *Ibid.*, at p. 286.
[26] (1959) 263 F. 2d 135.
[27] *Ibid.*, at p. 138.

choice is open to shippers although the *ad valorem* rates are higher."

The same judge repeated his view in *Pannell* v. *United States Lines Company*,[28] concerning a yacht carried on the deck of a ship, though it was held by the United States Court of Appeals, Second Circuit, that the Carriage of Goods by Sea Act, 1936, applied only as it had been incorporated into the contract and not as a matter of law. He considered that the words "customary freight unit" should be applied to the yacht as a whole.

There seems considerable force in his argument that[29]:

> "had Congress intended to extend this limitation only to the unit used in calculating freight charges it would have been very simple to have so phrased the statute."

In view of the conflict of interpretation of the words in the cases considered above, perhaps it is as well that our own Parliament did not use them in the Carriage of Goods by Sea Act, 1924, as finally passed.

In Canada the question of the meaning of the "unit" used in the corresponding Act—*viz.*, the Canadian Water Carriage of Goods Act, 1936, Art. IV, r. 5—has recently been considered by the Supreme Court in *Anticosti Shipping Co.* v. *Viateur St-Amand*.[30] This case concerned a motor-truck, which was damaged during a voyage from Port Menier to Rimouski. Support is lent by it to the second view expressed by Temperley and Vaughan set out above.

Rand J., giving the judgment of the court, said that the word "unit" would normally apply only to a shipping unit, *i.e.*, a unit of goods; the work "package" and the context generally seemed so to limit it. But it had been suggested that it meant the unit of the charge for freight. Neither the bill of lading nor the evidence threw any light on the freight rate unit. The weight of the truck was shown, but to assume that the charge was calculated on a rate for 100 lb. would bring a fractional figure, which was most unlikely to represent the actual basis. The sum of $500 would scarcely be taken as a fair limitation of the value of the average 100 lb. weight of freight. In the instant case the amount would be the product of 102·16 units at $500 each, *i.e.*, $51,000, which seemed disproportionate to any policy estimate to be attributed to the rule. The court therefore was left to take the unit as being that of the article. The learned judge thought that it was indisputable that this might produce anomalies, but the rule did not seem to permit qualification.

E. R. HARDY-IVAMY.

[28] (1959) 263 F. 2d 497. Judgment was given in this case on the same day as that in the preceding case.

[29] *Ibid.*, at p. 499.

[30] [1959] 1 Lloyd's Rep. 352.

Adams *v.* National Bank of Greece and Athens [1]

In 1927 the National Mortgage Bank of Greece issued sterling mortgage bonds which the National Bank of Greece guaranteed. The proper law of the bonds and of the guarantee was English. In 1953 the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated by Greek decree and a new company, the National Bank of Greece and Athens, was formed to take over the business of the amalgamated banks. The amalgamating decree provided that the two original companies were dissolved and their entire assets and liabilities vested in the new company as universal successor of the dissolved companies subject, however, in the case of the liabilities to a Greek moratorium law passed in 1949. Shortly afterwards the new National Bank of Greece and Athens filed with the Registrar of Companies the particulars required by Part X of the Companies Act, 1948, and commenced business here.

Subsequently the holder of a number of bonds claimed payment of accrued interest from the original debtor bank, the National Mortgage Bank of Greece, which had continued in existence, and on payment being refused brought an action here not against the principal debtor bank but against the new bank, the National Bank of Greece and Athens. The reason for this appears to be that neither the National Mortgage Bank of Greece nor the National Bank of Greece had assets or sufficient assets (the reports are not clear on this point) in this country whereas the National Bank of Greece and Athens had assets here of the Bank of Athens to which it had succeeded. The House of Lords [2] held that the action would lie because (briefly) in the circumstances we would recognise the law of Greece, the law of the domicile of the dissolved company and of the new company, which determined the status of the new company and which had nominated it universal successor inheriting all the rights and liabilities of the dissolved company. The Greek moratorium was no defence since the proper law of the contract was English.

Meanwhile the Greek Government passed, in July, 1956,[3] a decree whereby a new company formed by the amalgamation of other companies became the universal successor to the rights and obligations of the companies amalgamated except for obligations to which such companies were liable as principal or guarantor on bonds payable in gold or foreign currency. This decree was given retrospective effect and applied to the National Bank of Greece and Athens as from the date of its creation. The Bank was thus absolved by Greek law from all liability as guarantor of the bonds.

[1] [1959] 2 W.L.R. 800; [1959] 2 All E.R. 362.

[2] *National Bank of Greece and Athens S. A.* v. *Metliss* [1958] A.C. 509, affirming the decision of the Court of Appeal in *Metliss* v. *National Bank of Greece and Athens S. A.* [1957] 2 Q.B. 33. See 21 M.L.R. 425 and 7 I.C.L.Q. 370.

[3] Four days after the decision of Sellers J. in the *Metliss* case.

On the new bank again being sued,[4] this time for the payment of interest and principal due on the bonds, it pleaded that being a Greek company and not a party to the original contracts its only possible liability was under the law of its domicile and under Greek law as a result of the retroactive decree it was absolved from liability. This contention was rejected by Diplock J. He held that the decree of 1956 was not entitled to be recognised since it was not a law of succession and could not be made such by the retroactive effect given to it by Greek law. Moreover he held that the National Bank of Greece and Athens though not originally a party to the contract had been substituted as a party by the English courts' recognition of the 1953 decree as being effective to bring about a substitution and thereafter the parties' rights could only be affected by English law which was the proper law of the contract.

The Court of Appeal,[5] however, was unable to agree with Diplock J.'s decision. It held that the bondholders' only rights against the new bank rested on Greek law which had in 1953 imposed, as an incident of the status of the new company, liability towards the bondholders. It therefore followed that if " they aver that Greek law can create, they must accept that Greek law can change " and at the time when the action was brought, because of the 1956 decree, Greek law had changed and deprived the bondholders of their previous rights under it. The appeal was therefore allowed.

With respect, however, there appears to be much to commend Diplock J.'s approach to the problem. In the first place it seems preferable to treat this as a question of classification and to refuse to recognise the decree of 1956 because, as it was enacted after the dissolution of the National Bank of Greece, it is not a law of succession.[6] Secondly, if it is accepted that the recognition of the 1953 decree in the *Metliss* case made the National Bank of Greece and Athens a party to the contract of guarantee, it would follow that since the proper law of the contract is English, Greek law cannot subsequently discharge the new party unless English law recognises the discharge.[7] And English law cannot recognise such a discharge for to do so would be to give extraterritorial effect to foreign confiscatory legislation. The Court of Appeal, however, disagreed with Diplock J., deciding that the appellant bank had not been made a party to the contract by the House of Lord's recognition of the 1953 decree in the *Metliss* case, because the House had made it clear in that case that there was no plea of novation or statutory assignment. But, it is submitted, it does not follow because there was no plea of novation or statutory assignment, that the

[4] *Adams* v. *National Bank of Greece and Athens* [1958] 2 Q.B. 59.
[5] *Adams* v. *National Bank of Greece and Athens* [1959] 2 W.L.R. 800; [1959] 2 All E.R. 362.
[6] Compare succession to the movables of an intestate: Dicey, 7th ed., Rule 113, pp. 598 *et seq.*
[7] See Dicey, 7th ed., Rule 155, pp. 804 *et seq.*

House decided that the National Bank of Greece and Athens was not a party to the contract. On the contrary it is submitted that the House had to decide whether the 1953 decree could be recognised so as to make the National Bank of Greece and Athens a party to the contract under English law. It pointed out that this was a novel point since there was no question in the case of its having been made a party by novation or statutory assignment but, it is submitted, it decided that the Bank was made a party to the contract by the recognition which it was able to give to the decree of 1953 and the Bank's status under it. With respect it is submitted that the Court of Appeal in *Adams*' case had to decide whether the National Bank of Greece and Athens, having been made a party to the contract by the recognition of the 1953 decree, could be discharged from its liabilities by the decree of 1956, and the House of Lords in *Metliss*' case, by their approval of *Antony Gibbs & Sons* v. *Société Industrielle etc.*,[8] had made it clear that it could not.

At all events there seems little doubt that the claims of the bondholders for arrears of interest which had accrued before the date of the 1956 decree were unaffected by the decree because they were debts situate in this country. It seems, however, that this argument cannot be used in support of the claims arising after the decree because, as those debts had not fallen due at the time, they were not enforceable and had no *situs* in England.[9]

P. Keenan.

[8] (1890) 25 Q.B.D. 399.
[9] *Re Helbert Wagg & Co., Ltd.'s Claim* [1956] Ch. 323, 339–340; Dicey, 7th ed., pp. 504–505.

REVIEWS

THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY. Selected and Edited by SIR HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A., Judge of the International Court of Justice, and C. H. M. WALDOCK, C.M.G., O.B.E., Q.C., D.C.L., Chichele Professor of Public International Law, Oxford. [Oxford: Clarendon Press. 1958. xxxvi and 375 and (index) 11 pp. 50s. net in U.K. only.]

THE death of Professor Brierly is a great loss and this publication of his collected papers is a fitting tribute to one of the most humane, penetrating and lucid exponents of international law in the first half of the twentieth century not only in this country but throughout the world, a worthy successor to a long line of distinguished British international lawyers.

Regarding a platitude as often "a truth that no one denies but everyone forgets" (p. 250), the late Professor Brierly was not one who disdained the homely truths, but strove in all his writings to hammer home the fundamentals of international law, eschewing, in that process, any juristic aerobatics or stunts in words, terminology, theories, ideological causes or purely emotional appeals. He addressed himself not so much to other international lawyers as to the world at large. But it would be equally wrong to think of him as a populariser, even if his *Law of Nations* and *Outlook for International Law,* which have not been included in the present collection, besides being invaluable works for students, are probably two of the most suitable books in any language to be recommended to an intelligent layman wishing to gain an adult introduction to the subject. In reading or re-reading his works, one cannot help being repeatedly struck by his deep humanity and sincerity. He talked to his readers or audience but never talked down to them; he enlightened but never dazzled or dazed them with his own learning. There is a total absence of special pleading or playing to the gallery.

The present collection publishes for the first time the English text of his lectures at the Hague Academy in 1928 on the "Basis of Obligation in International Law," previously available only in French. This is probably his most theoretical work. In it he rejected voluntarism as a rational explanation of the binding force of law, whether in the form of consent or that of the "sense of right" (*conscience juridique de l'homme*), but found the true basis of law in a rule of morality:

> "If we ask why we ought to obey rules of law simply because they *are* rules of law, the answer is that there is a rule of morality of which this is the content" (p. 66).

But it may be questioned if this represents Brierly's ultimate view on the subject. His original conclusion might have been influenced by its being doubtless correct in an exceptionally homogeneous and law-abiding society such as England. That Brierly subsequently became aware of this fact may be inferred from the following passage in an address delivered in 1946:

> "At the time of the General Strike in England in 1926 a court of law decided that the strike was illegal, and some people thought that that was one of the causes that led to the collapse of the strike. I am not sure that they were right, but, even if they were, it only showed that the law-abiding sentiments of Englishmen had placed a reserve power of moral influences behind English law. That does happen in

a society where respect for law is of long standing and has struck deep roots into the life of a people, but the sentiment which thus becomes attached to the law is still something added to it from outside the law itself.

"Now unfortunately in the international field we have not yet got, except in an attenuated form, this moral power to act as a substitute for physical power, because we have not got the sense of community which alone can produce it. Instead we have a situation in which, though States do normally obey the law, they do so with a sort of implied gentlemen's understanding that it must not be too exigent in its demands upon them, and that they reserve the right to evade it if its claims are pitched too high" (p. 334).

It is only in a highly integrated community that force recedes to the background and morality comes to the fore as the mainspring of the legal system.

Already in 1936, writing in the *Acta Scandinavica*, Brierly recognised that:

"Law . . . is the conscience of a community expressing itself in rules of conduct appropriate to the conditions in which the members of the community have to live their common life. Those conditions differ greatly for the individual members of the State-community and for the States members of the international community. The former, because they are very numerous and because they are for the most part homogeneous, develop a vast number of rules of law of general application; the latter, because they are few and because each is unique, do not. Yet in both spheres the law has the same fundamental purpose of maintaining a scheme of order within which the relations of the members of the community with one another, individuals or States respectively, can be carried on and their differences be resolved without intolerable friction; in both the strength of the law depends on the support it receives from the community; but the forms and methods in which this spirit of legality is manifested cannot be quite the same" (p. 259).

At this point, Brierly's dissent from the consensual theory of the positivists and the sociological school's postulate of the "*conscience juridique*" becomes merely a matter of degree; for "support" differs but little from consent and "spirit of legality" from the sense of right.

In an illuminating introduction, Sir Hersch Lauterpacht has rightly pointed to Brierly's conception of the unity of international and municipal law (pp. xxi *et seq.*), but it is with respect submitted that, in Brierly's mind, this unity was not a normative one involving identity in the subjects of both branches of the law, but merely a sociological one in that they are both means of social regulation possessing largely the same statics and dynamics, but operating in different social environments.

The chief differences in the social environment in which international law and municipal law operate were, in Brierly's view, first the smaller number of subjects of international law as compared with any municipal legal system—thus rendering the former far less impersonal—secondly that, although powerful subjects did exist also within a State, in international society they were proportionately far more numerous and immensely more formidable and, finally, the lack of a community sense and its accompanying institutions in international society.

"If a system of law is to be really effective it must be something more than merely a body of rules; that in effect is what international law is at present, a body of rules, but not yet, as it should be, a true legal order. For a true legal order implies—besides rules for the behaviour of those, whether States or individuals, who are subject to it—the existence of institutions for organising the relations of the members of the community which it holds together" (p. 311).

In the initial inter-war period, Brierly did believe peaceful change to be an essential part of this international order (*cf.* pp. 72 *et seq.*) when he said in 1924:

> "We may grant that every State wishes to see its own interests protected; yet to believe that States actually prefer the protection of their interests by extra-legal means, rather than by law, if the choice is offered, would be an exaggerated cynicism" (p. 71).

Subsequent events forced him to revise his earlier over-charitable interpretations of the behaviour of States. By 1942, he wrote:

> "Demands for a 'Place in the Sun,' for *Lebensraum*, for *Mare Nostrum*, for New Orders, these are not the sort of demands that can be met and satisfied by offering to the claimants merely what they are entitled to in reason and justice. They can be met only in one or two ways, by yielding, or by opposing to them a preponderance of power. . . . That is perhaps the greatest of all the mistakes that we have made in the struggle to stabilise peace in these years between the wars" (pp. 278–279; *cf.* also pp. 334–335).

Doubtless the same reasons induced Brierly in later years to modify his earlier belief in the integrating force of modern economic and technological developments (*cf.* pp. 75, 80). In an address delivered in 1948 he said:

> "It is easy to assume that the growing interdependence of States in material things, the triumphs of modern science in reducing distances, in creating and satisfying new demands for the products of other nations, must automatically create new links of community and make the ideal of a world community easier to realise. Perhaps if human affairs were more wisely ordered than they are, if men were clearer-sighted in seeing their own true interests, that might be so. Unfortunately, as things are, if this material dependence of our nations one upon another is left to develop unguided, it is at least as likely to aggravate as to mollify the frictions to which it inevitably gives rise" (p. 368; *cf.* also p. 273).

But these changes of view, far from casting any reflection on Brierly's sense of realism and judgment, are in fact evidence of his qualities of inherent fairness, humanity, and, as Sir Hersch Lauterpacht has pointed out (p. xxix), intellectual integrity, to which may be added his moral courage. For bold would he be who can confidently maintain that the events of the thirties could have been and should have been foreseen in the early twenties!

But there can be little controversy on the fundamentals of Brierly's teachings, —"The dependence of international law, first upon the establishment of international order, and secondly upon international organisation" (p. 337). Here, it should be pointed out that Brierly used the latter term to mean not legal organisation—sole emphasis on which Brierly regarded as "not only a delusion, but a dangerous one" (p. 312)—but social organisation.

> "If [international law] is destined to go forward, it will be because it can draw strength from the establishment of an assured international order and from the knitting of the nations into a true community rather than from any purely juridical approach to its problems. For law is essentially a by-product of an integrated social order" (p. 337).

While he conceded that functional co-operation and institutions might be made a starting point (pp. 374–375), it would be well not to forget his strong deprecation of "the impression that progress can be made without giving up anything substantial of the liberty of independent action which States have hitherto insisted on reserving for themselves" (p. 312) and his reminder of the ultimate need for "moral regeneration" (p. 370). It is perhaps typical

of the man that this collection of his works should end with the following message:

> "Yet it seems to me that, notwithstanding all the discouragements of the present international outlook, we have a duty to look to the future, if not with confidence, at least with hope, and, in the words of our English poet, Robert Browning, to 'greet the unseen with a cheer.' *Sursum corda*" (p. 375).

Bin Cheng.

Servitudes of International Law. A Study of Rights in Foreign Territory. By F. A. Váli. Second edition. [London: Stevens & Sons, Ltd. 1958. xvi and 349 pp. £2 10s. net.]

The first edition of this work was published in 1933 and has long been regarded as a useful contribution to the study of a perplexing branch of international law. In view of the rapid growth during the last twenty-five years of the practice whereby one State seeks rights of a real nature in the territory of another State, the production of a second edition, made possible by a grant from the Rockefeller Foundation to the author when he was a refugee from Hungary, is very much to be welcomed.

Dr. Váli begins by considering a typical definition of servitudes, such as, for instance, "restrictions of territorial sovereignty." This leads him to embark upon a theoretical discussion of the nature of sovereignty in international law and the difference between territorial sovereignty and personal sovereignty. He next considers the differences between localised and non-localised restrictions of sovereignty, between real and personal rights, between positive and negative rights, and between general and particular international law. Although not without value, these opening chapters are too superficial to throw much light on the main problem under discussion, and the author quite rightly proceeds next to trace the history of international servitudes and the practical necessities which have given rise to the theory. At this point he tells us: "The problem of international servitudes can be ultimately reduced to the following question: are the relations in question of a kind, character or nature which would justify both scientifically and practically their separation from other juristic relations and their independence within the study of international law; and, if so, what are the characteristics which support such a separation?" (p. 44). The problem is thus well analysed and the question well put, and Dr. Váli is to be applauded when he goes on to say: "A positive and adequate answer would give a solution to the problem in substance. The question of terminology is another important problem." Few questions in international law have been more bedevilled by terminological difficulties than this one. Dr. Váli is right in distinguishing between the substance of the problem and the matter of terminology: the latter must be a means to an end, and not become an end in itself.

Dr. Váli seeks to answer the question he set himself by a study of the practice of States. This leads him to analyse classical cases, such as the problem of fishery rights in the North Atlantic; the Polish corridor; the Panama canal; the Aaland Islands; the Free Zones of Upper Savoy and the District of Gex; and the question of mining rights along the Netherlands-German frontier. Together with these he discusses new problems, such as those created by guided missile ranges, military bases in foreign territory, oil pipelines and the situation of the headquarters of the United Nations in New York City. The author rejects the easy course, which would be to say that these are all examples of régimes *sui generis* in international law. Despite the differing features of the examples, he feels confident that they

disclose the existence of "something intermediate between merely conventional relations and territorial sovereignty" (p. 304). It is this "something intermediate" which constitutes for him the essence of a servitude.

"The servitude of international law," he says, "is a permanent (durable) legal relationship established by a particular international treaty whereby one State, or a certain number of States, is or are entitled to exercise rights within part or the whole of the territory of another State, for a special purpose or interest relating to the territory in question, or whereby a State is obliged towards another State, or a certain number of States, not to exercise certain of its rights within part or the whole of its territory, for a special purpose or interest relating to this territory." (p. 309.) The key phrase is obviously "for a special purpose or interest relating to the territory in question," and it is perhaps not altogether facetious to say that, until one has defined that phrase, one is not much further on than if one had described all the so-called servitudes of international law as régimes *sui generis*. A more serious criticism appears to be that, having stressed the purpose or interest relating to a piece of territory as the essence of a servitude, the author goes on to tell us that "the civilian doctrine of the '*praedium dominans*' and '*serviens*' has no standing whatever in international law" (*ibid.*), since the relation in a servitude exists between States and not between a State and a foreign territory, still less between one territory and another. If that is so, it is not clear what purpose is served by introducing the notion of servitudes at all into international law, and whether all the phenomena which it is sought to group together under this rubric could not be better studied under more familiar and fundamental headings, such as recognition, State succession and the law of treaties. Nevertheless Dr. Váli's book remains an invaluable commentary on a most difficult subject.

D. H. N. Johnson.

John Howard: Prison Reformer. By D. L. Howard. [London: Christopher Johnson. 1958. 186 pp. 18s. net.]

The author of this book appears to be a prison visitor who as part of his educational work has encouraged discussion of penal reform among the prisoners with whom he has worked, and has found the life of John Howard a perennial subject of interest among them. This seems to have led him into some rather superficial researches into the work of the great prison reformer and thus to the writing of the present volume.

It is indeed a pity that something rather more solid and scholarly has not been forthcoming, especially as there does not seem to have been a book about Howard since Stoughton's *Howard the Philanthropist and his Friends* (1884). As will have already appeared the appeal of the present volume is essentially popular, and as such it may fulfil a useful purpose at a time when there is so much general interest in the problem of punishment. It does bring out in an interesting way the main features of Howard's life and work and relates the latter to modern penal developments, though in a rather patchy and sometimes superficial way. The book is awkwardly written and the author's sententious observations on Howard's peculiar personality are often irritating.

Howard certainly was a strange character and it is certainly an element of real value in this book that it in no way covers up his abnormalities and weaknesses. Among the latter his curious relationship with his manservant Thomasson is emphasised. It is hinted that there was a homosexual element in this: the evidence that Thomasson was so addicted and led Howard's son and only child into vicious practices seems to be conclusive. Perhaps Howard was of that fine type who succeed in sublimating their weakness.

John Howard was the son of a prosperous upholsterer in London who like many businessmen was a nonconformist. As a result of this, higher

education was debarred to John, but as the father had bought an estate in Bedfordshire the son, who inherited it, succeeded in establishing himself among the county families there, becoming High Sheriff of the County in 1773 at the age of forty-seven. It was in this position that he was brought into touch with the local prison, and from the interest aroused in him in this way that his career as a prison reformer began.

Howard was a restless energetic man who had travelled a good deal on the Continent, and had been influenced by that important eighteenth century movement "philanthropy" which had already made him a model landlord who took pains over both the physical and religious welfare of the tenants on his estate, before he took up prison reform. Much if not most of eighteenth century philanthropy was independent of religion and indeed provides one of the major historical antecedents of present day humanism, but in Howard religion provided the driving force. Howard's first tour of prisons was made during the winter of 1773–1774, and having communicated some of his observations to a Member of Parliament he was called to give evidence to a Committee of the whole House of Commons. As a result of this he had the unusual honour of being called to the bar of the House to receive its thanks. And this may be taken as the commencement of his fame as a prison reformer. His great book *The State of the Prisons* which was published in 1777 had an immediate success and placed its author not only in a unique position as a prison reformer, but also at the very head of the philanthropic movement. Thus he became popularly known as, "the philanthropist," and after he died he was considered worthy of commemoration by a statue in St. Paul's Cathedral which when it was first placed there in 1795 was, our author says, the only one in the Church.

This is hardly the place for a critical appreciation of *The State of the Prisons*. But this book brings out the immense care and industry which went into its production, and also the wide extent of its repercussions—educated Europe was a more homogeneous affair in the eighteenth century than it has since been, and French and German editions of the work appeared within a few years of this first publication: at Moscow too there was talk of a Russian edition.

One of the facts about Howard which is most widely known is that he died in Russia of a fever contracted while visiting a hospital at Cherson on the Dnieper. It is not so well known that his first visit to that country originated in a report which had reached him that the death penalty had been abolished there. Nor indeed that on his final journey he was chiefly concerned with a new interest, an investigation of the causes and cure of the plague. He had already become concerned about the state of the hospitals, and had he lived might well have initiated a campaign for their improvement of even greater importance than that for prison reform.

The unusual interest aroused by *The State of the Prisons* is surprising until one remembers that in the eighteenth century imprisonment was mainly a method of bringing pressure to bear on debtors, a class of the community who had a better claim on the sympathy of people than had criminals. It was of course against the abuses of this system of imprisonment for debt that Dickens, Reade and other writers were to rouse the public again more than a generation later.

The impression of Howard's character left by a perusal of this book is one of restless energy, industry combined with a capacity for accurate observation—indeed he might almost be claimed as our first scientific sociologist for as his biographer justly notes, "he was the first to make a detailed analysis of any social problem"—courage—he was threatened more than once with the displeasure of the authorities in the countries which he visited, but never drew back—and a passion for truth which could not be subdued, even by the threats of these same authorities. At the same time he was prickly and self opinionated, a man who found it difficult to work with others and who hardly made a friend. His love of humanity was seldom

evidenced in his personal relationships, but seems rather to have been one of those grand abstract passions which from time to time provide the driving force which moves political, and even more, religious leaders. It was this no doubt which keeps his memory green today.

C.

The Society of Captives. A Study of a Maximum Security Prison. By Gresham M. Sykes. [Princeton, N.J.: Princeton University Press. London: Oxford University Press. 1958. xx and 144 pp. 30s. net.]

Among the sanctions of the criminal law, imprisonment has been by far the most prominent for the past 150 years and more. It is likely to remain so for a long time yet, although it is often suggested that this form of punishment may well be working in the direction of the prisoner's deterioration rather than towards his rehabilitation (which must surely be the aim unless deprivation of freedom is life-long).

Is this charge well-founded? Certainly, recidivism is now recognised as the crucial problem of penology, that "hard core" of repeated offenders who move gradually from petty larceny to robbery with violence, and from unruliness to knife-sticking and gunning, and whose steady progress from approved school to Borstal, corrective training and at last to preventive detention is only broken by ever-shortening periods of ill-used freedom.

Countless attempts have been made to establish, largely through statistics, the chances of a man who is once fairly launched on a criminal career to break loose from the vicious circle of crime and prison. Penologists and social reformers are still busy assessing, without issue, the relative contribution of criminal propensity *vis-à-vis* social environment in the so-called "free world" for the making of delinquency, and building penal theories on their various hypotheses. But—leaving aside altogether the more intangible aspects of human personality—the question must be asked whether propensity and background environment are the sole determining factors which can be so assessed. Has not perhaps the law by its own institutions created yet another powerful cause which makes for more crime? Does the gathering together of difficult, unmanageable, sub-standard children in approved schools, the exclusive association of tough and delinquent adolescents in Borstal institutions, the concentration of criminals in over-crowded prisons create for them there the kind of surroundings and relationships in which they are likely to develop and need the qualities suitable for a peaceful life in the community at large? Or do the singular conditions of confinement in which they are being placed lead and encourage, and even oblige them to adopt attitudes and values, and to contract habits which are fundamentally at odds with the values accepted—and, by and large, observed—elsewhere?

Ecologists have shown us, convincingly, the existence of certain limited geographical areas (especially streets and districts in big cities), where the constant association of delinquent or semi-delinquent elements creates a "criminal sub-culture" so universally accepted by all who live there and exercising so powerful a hold on them as to make it exceptionally hard for an individual not to fall in with the prevailing code of behaviour and its low moral standards. Are not, perhaps, conditions in prison more extreme still? Do we really expect inmates of closed prisons to adopt the way of life and the moral attitudes piously intended for them by the prison commissioners rather than those sanctioned by their fellow prisoners who share with them the same predicament? Solitary confinement was recognised over 100 years ago as a noxious system, but is the result of association any better? In the last resort we must not shirk the question whether a man who has spent more than one

prolonged "stretch," or perhaps two, in a closed prison is likely to be fit to be released upon society at all?

To come near a useful, objective answer to these questions we need to know, first of all, far more about the realities of prison life than we do now. Unfortunately, though perhaps to some extent unavoidably, secrecy has always in some odd way been bound up with prison; official publications may tell us about the organisation of prison routine and activities as they are intended to be carried out, but guards as well as captives are jealously disinclined to allow outsiders to pry into the less obvious aspects of the day to day relationships which develop in the closed world in which they are unequally but inescapably thrown together. Such inside accounts as we do get —with some frequency of late—from ex-convicts are likely to be biased by resentment or incomplete in some significant way or other; the warders, whose impressions might be of equal interest though no less coloured, are by their very office prevented from going into print even if they were tempted to do so.

Dr. Gresham Sykes, a sociologist, must be considered a highly favoured man for being given the opportunity to study freely, as a strictly neutral observer, life in one American penal institution over a period of three years. His study of the social structure and inner working of this one particular prison as a strictly circumscribed "Society within Society" is based, as he says, not merely on official regulations and reports, but above all on first-hand knowledge of the practical day to day functioning of these rules and on a great number of interviews and informal talks, over a long period, with all the "men in prison"—both the prisoners and their guards. It is of course true that some of his data and observations are peculiar to the New Jersey State Maximum Security Prison at Trenton, N.J., and its 1,200 male adult criminals among whom he carried out his investigations. Nonetheless, the picture which emerges of the pattern of social behaviour at this particular institution, of the inter-action between warders and prisoners and among the prisoners themselves may in many ways be taken as typical of any present-day penal establishment where "older, more serious and more recalcitrant offenders with poor records and long sentences" are held together. Since we, in this country, have so little information from unexceptional and untainted sources about the inner working of closed prisons, Dr. Sykes' work must be welcomed as a most important step in a new direction.

This is above all true of the chapters in his book which deal with the "defects of total power" in the regime of the custodians and with the "code of behaviour which the captives have developed among themselves to cope with the restrictions and mitigate the rigours of life behind prison walls." We are generally inclined to regard the acknowledged shortcomings of prison staff as largely due to individual failings and tend to point to the difficulties of recruitment for a job which is "depressing, dangerous and possessing relatively low prestige." Dr. Sykes, on the contrary, has come to the conclusion that these shortcomings among warders are "far transcended" by defects inherent in the regime of absolute power which they are expected to administer. "Unable to count on a sense of duty to motivate their captives to obey, and unable to depend on the direct and immediate use of violence to insure . . . submission to the rules, the custodians must fall back on a system of rewards and punishments," but the scope for either is in the nature of things slight, so slight indeed in a closed prison that they look mostly like "gestures of futility." "The glaring conclusion is," Dr. Sykes writes, "that despite the guns and the surveillance, the searches and the precautions of the custodians, the actual behaviour of the inmate population differs markedly from what is called for by official commands and decrees." Worse still in its implications—if they should be universally valid—is the author's finding that in trying to achieve a *modus vivendi* with the prisoners and to secure a reasonably smooth running of their shift, individual warders may virtually find themselves compelled to "buy compliance and obedience

in certain areas at the cost of tolerating disobedience elsewhere," and even to transfer some of their minor chores into the hands of inmates whom they have come to trust. By such little concessions, however innocuous at first sight, the position of the warders can easily be compromised and even corrupted.

As for the prisoners, their reaction to what Dr. Sykes calls "the pains of imprisonment"—degradation, boredom, loss of normal emotional and sexual relationships, lack of material comforts and possessions and not least the loss of autonomy and freedom of decision which is the result of their subjection to an infinity of rules and commands designed to control their behaviour in minute detail—must differ of course according to the personality of each individual. Dr. Sykes—very intelligently, I think—uses prison argot, the particular vocabulary created and employed in prisons for the specific problems of prison life, as a touchstone and expression of group ideals and loyalties. This enables him to generalise with considerable conviction about the social system established among prisoners, about the qualities which they admire and respect among their fellows and those which they condemn and detest, and about the degree of solidarity which they develop. This cohesion is never complete, but it is plain that, where none can escape the constant company of his fellows, and where there is no complete security even against violence for the outcast, the pressure to fall in with the beliefs and values of the majority is very strong. That these beliefs and values differ markedly from what we would like them to be can be gathered at once by simply listening to the language which fills a prison. And indeed, if we cast out convicted delinquents from our society and lock them up because we do not know what else to do with them, we can hardly expect them to feel and express our finest sentiments in the cells and blocks which are their miniature world. There is indeed honour even among thieves: the "real" man in prison, Dr. Sykes suggests, is he who is tough enough to take what is coming to him with that unflinching contempt for the "screws," and all they stand for which is usually termed "insolence" in official language. For the rest, prisoners naturally fend for themselves as best they may—in so far as they have any chance to exercise any initiative at all—employing every ounce of their ingenuity to cheat and bamboozle the warders and sailing as near the limit of open disobedience as possible; using intimidation and blackmail, petty violence and thieving, and shady bargaining of every conceivable sort—even with their bodies, since they have so little else—in order to make life physically and psychologically tolerable for themselves even at the expense of their fellows.

If this is a fair view of what goes on in prison—and who is to gainsay it?—the effect upon the individual can hardly prove altogether positive in the long run. It is not the least value of *The Society of Captives* as an outstanding sociological study that the author tries to interpret his facts and findings but refrains from drawing any far-reaching conclusions. For, after all, there is much more we need to know still.

H. A. HAMMELMANN.

COURTS FOR ADOLESCENTS. By HERMANN MANNHEIM, DR.JUR., HON.LL.D.(Utrecht). [London: The Institute for the Study and Treatment of Delinquency. 1958. 23 pp. 1s. 6d. net.]

PRISON REFORM NOW. By HOWARD JONES. [London: The Fabian Society. 1959. 31 pp.]

SOVIET CRIMINAL LAW AND PROCEDURE: FUNDAMENTAL PRINCIPLES OF LEGISLATION. [London: The Society for Cultural Relations with the U.S.S.R. 1958. 30 pp. 1s. 6d. net.]

MUCH of the important work which is now being done in criminal science is being made available in pamphlet form. We therefore bring to the attention

of our readers these noteworthy contributions which have recently appeared in that form. We do not propose to comment here on the material from the U.S.S.R. which is of no less importance than the two drafts put forward by a Standing Committee of the two chambers of the Supreme Soviet on (1) the Fundamental Principles of Criminal Legislation and (2) the Fundamental Principles of Criminal Procedure. These appear to be intended to set out the governing principles for the great codification of Soviet Criminal Law which has been under weigh for a number of years, and are obviously of great interest to all students of Soviet institutions as well as to students of criminal law. The Society for Cultural Relations with the U.S.S.R. deserves their thanks for making this material available in English.

Dr. Mannheim's pamphlet is the result of a research which he recently carried out into the special arrangements which exist in some countries for dealing with adolescent delinquents and which as he regretfully explains had to be somewhat partial in character. There has been growing up in this country for some years a feeling among welfare workers, probation officers, and some magistrates that it is not satisfactory to try adolescent offenders in the ordinary magistrates' courts, at any rate by the ordinary procedure, and as part of the general work of those courts. It is worth while recalling that up to 1908 even children from the age of eight were brought before "police courts" in the ordinary way. It is obvious that some of the considerations which led to the setting up of the juvenile courts under the Children's Act, 1908, apply to "big children" between seventeen and twenty-one, and there has been a good deal of support for a proposal to extend the age limit for the jurisdiction of these courts to that age.

On the other hand the problems of the adolescent are in many respects basically different from those of the child, and this has been recognised in a counter proposal which envisages the setting up of special courts to deal with young adults.

Similar problems have naturally been confronting the authorities in other countries, and Dr. Mannheim's study is in effect concerned with what has been done in two European countries, Western Germany and Sweden, and in two of the states in the U.S.A. The European countries mentioned are endeavouring to solve the problem by an extension of the jurisdiction of the juvenile courts, though only in West Germany have the new arrangements come into operation.

In New York State and New York City and also in Chicago the alternative scheme has been working for some years, and a short personal study of it which Dr. Mannheim has been able to undertake has convinced him that it is much the better, and he advocates that a somewhat modified version of it should be introduced here.

It should be pointed out that Dr. Mannheim's short appreciation of the West German system is based very largely upon an article which appeared in the *British Journal of Delinquency* and not on personal study, as in the case of the American courts. Perhaps a more extended research would be advisable, but prima facie it seems to us right that boys who have left school should be dealt with differently from those who are still there, so that we are disposed to agree with Dr. Mannheim's opinion and indeed would on this basis suggest that the jurisdiction of the proposed new court should operate from the time the lads leave school, or if that is regarded as undesirable, because of the different ages at which this event takes place, then from fifteen, which is an age which would catch most of those who have started work.

Dr. Mannheim's pamphlet also contains a useful appendix on the working of American and Canadian juvenile courts.

The Fabian pamphlet deals with the reform of our prison system, a subject which has been a good deal before Parliament and the public in recent years but which has been all too little the subject of serious scientific study

in spite of its long history, which goes back at least to John Howard's *The State of the Prisons* (1777). The author who is a lecturer in social studies at Leicester University is indeed a little too ready to assume that no serious work was done on the subject until he and his fellow sociologists got down to it, dismissing as he does the efforts of earlier well-meaning persons, which he thinks were based merely on "humanity" or "common sense conceptions," altogether too airily. What are we to make of such a statement as this? "When we tackle the reform of the prison system in a more scientific way, we find that the chief obstacle is the equivocal public attitude towards the prisoner." As if this had not been well known to all the common sense humanitarian reformers since they started in on the job, and did not form one of the basic arguments of Dr. Mannheim's *Dilemma of Penal Reform,* a book not without claims to scientific attainment.

And indeed a great part of Mr. Howard Jones' discussion does little more than repeat the familiar points which have appeared in the speeches in Parliament of the so-called empiricists whom he despises so much or their articles in the *Howard League's Journal* or elsewhere. It is curious indeed that no reference is made in these pages to the *British Journal of Delinquency* which is certainly the most scientific periodical dealing with criminological topics which is being published in this country, and perhaps in any country at the present time.

Nevertheless as I shall indicate later Mr. Howard Jones does bring out some important aspects of the prison system which have not in the past received the attention which they deserve. The chief weakness of his pamphlet lies in his failure to set out clearly the existing position which depends largely on the Criminal Justice Act, 1948. In the result it will be difficult for the reader who is not already well up in these matters to obtain a clear picture of the situation. It is not therefore possible to commend this pamphlet to the attention of that type of reader, as one would like to be able to do.

Some of the most valuable work which has been done by sociologists during the past generation has been concerned with group activities. This knowledge has been used by criminologists for example in the study of the criminal activities of gangs, but this use has been rather patchy, and it could certainly have been more effective in connection with the social context of prison life, both among the inmates and the staff. How important these matters are appears clearly enough from several of the books of reminiscences produced by ex-prisoners which were so popular a few years ago. A great deal of research into these matters is clearly called for—indeed, some is already going on—and this point is well made by Mr. Howard Jones who asks pertinently about the likely effect of the entrenched traditions and patterns of conduct among the prison staffs upon the attempts to spread the so-called Norwich system more widely—this is the forward looking attempt made by the governor of that prison to establish a sort of "big brother" relationship between the prison officers and the prisoners. The central part which must be played by the staff of the prisons if the present reformist phase of prison discipline is to be successful has of course been realised more and more in recent years, but the matter is handled with exceptional understanding in these pages.

It is interesting also that Mr. Howard Jones comes down in favour of the specially qualified sentencing tribunal so successfully used for some years past in California. This proposal which the writer of this review also supports has made but a slight appeal in this country where there is altogether too much confidence in the natural ability of judges to perform the difficult task of sentencing convicted criminals.

Aftercare is not more obviously a part of prison reform than is probation, and it is not clear on what basis Mr. Howard Jones deals with the one subject and not the other. Yet its importance and the inadequacy of the present arrangements, improved as they have been of recent years, becomes more and more obvious as one studies the subject of punishment in a broad

perspective. Sensible suggestions are here made for linking aftercare up more closely with the prison system and indeed with the whole problem of the employment of prisoners both in and out of prison, and both during and after the period of sentence, an aspect of the matter which is very properly stressed.

Other matters dealt with by Mr. Howard Jones are the urgent need for a programme of rapid building of prisons, and for better arrangements for "diagnosis" before sentences are passed. On these points however he is more obviously swimming with the tide of informed opinion—indeed on the diagnosis question we are almost into port, since the Committee under Streatfeild J. on the Procedure of the Criminal Courts has had this matter specifically referred to it.

C.

Prisons. By B. K. Bhattacharyya. With a Foreword by Dr. Hermann Mannheim. [Calcutta: S. C. Sarkar & Sons (Private), Ltd. 1958. 196 pp., including Select Bibliography and Index. Rs. 10.00, £1 5s.]

"Looking at world penological literature," as Dr. Mannheim remarks in his Foreword to this book by one of his former students, "we do not find very many examples of High Court judges appearing in the role of reformers and interesting themselves in all the details of this unpopular topic" with the enthusiasm and knowledge exhibited by the author. But it is not only because its author is now a judge of the High Court of Calcutta that this book can claim to be a unique contribution, but also because it gives a fairly up-to-date account of the problems of prison administration in what must still be described regrettably as an underdeveloped country, with all the problems which poverty, illiteracy and a crowded population create. As such, Dr. Bhattacharyya's book will be of great interest to scholars who aspire to study prison administration along comparative lines, and it will provide a bridge for the Asiatic and African student of penology, which has hitherto been almost wholly lacking, between the study of the highly developed prison systems of the West and the immense problems of a relatively backward country enjoying an entirely different and diverse pattern of social systems and culture.

It is from this angle that the book should surely be judged; perhaps we need not be too critical of errors of fact about the British prison system, or outdated facts and statistics even about the Indian prisons, but should assess it on its general approach and interpretation. We can say at once that the approach is liberal and humane, and the interpretation sympathetic and understanding. There are few errors of judgment, however many misprints may creep in, and we must congratulate the author on his considerable achievement, for it cannot have been easy to compile this book.

To begin with, the Indian system of prisons is not a unified system administratively, as it has been in England since 1875. The author has had to travel widely in order to collect his material, and it is inevitable that some of his observations relate to conditions which, although they may have been true on the date observed, have since been rectified or improved. As the author himself remarks, in his Preface, no one would be happier than he "to learn that the defects mentioned have been remedied since."

Secondly, the rate of change in the English prisons has been so rapid that it is almost impossible for a person situated in England to keep up with all the latest developments, leave alone a person separated by many thousands of miles from the relevant sources of information.

The minor blemishes are however rather irritating. The very first page speaks of the alleged principle of "non-eligibility" of prisoners, mis-quoting

from Dr. Mannheim's *Dilemma of Penal Reform*. The "ethical aberrant personality" described on p. 18 is not one of the commonly used descriptions of the psychopath. On p. 34 the author cannot have intended the conditions of confinement to be made both "as mild and onerous as possible." Pre-release training for preventive detention prisoners must begin before two-thirds of the sentence has been served, not as stated on p. 37, after two-thirds of the sentence, for admission to the so-called "third stage" entitles the prisoner to one-third remission of sentence instead of one-sixth. The maximum earnings of English prisoners now amount to 7s. per week, not 1s., as stated on p. 75. The first two corrigenda on p. 189 appear to be incorrect.

Not the least interesting parts of the book are the Appendices, which occupy over fifty pages, and which reproduce certain Minutes of Lord Macaulay's concerning the early nineteenth century Indian prisons, together with an account of Transportation to the Andaman Islands, and details about the conditions in the old Bengal jails.

J. E. Hall Williams.

Zum Ehescheidungsproblem. Eine rechtstheoretische Studie. By Otto Brusiin. [Distribution: Akademische Buchhandlung, Helsinki, Finland. 1959. 133 pp.]

Divorce is probably unique among the major topics of the law in the opportunities it offers to comparative lawyers or to law reformers. The author of this study, a Finnish jurist of distinction, would be well qualified to deal with divorce from both these points of view; he has chosen, however, to approach the subject differently. His concern is with legal theory which he defines as research into the relations between human behaviour and legal norms. Legal theory makes use of comparative methods to provide the material for theoretical analysis, but it must be kept distinct from matters of legal policy. Questions of divorce are considered particularly suitable for theoretical analysis because they provoke strongly emotional responses and also because here human conduct tends to deviate from legal norms. This can be explained by the fact that legislation on divorce, unlike most modern legislation, is not primarily designed to control the conduct of the individual, but is rather conceived so as to express the prevailing attitude towards the institution of marriage. The concept of fundamental attitude (*Grundeinstellung*), thus introduced, must be added to "human behaviour" and "legal norm" to complete the list of essential instruments of legal theory. Fundamental attitudes tend to become uniform in social life and a particular attitude will become dominant in any given society. Three types of fundamental attitudes, the religious, the secular-dogmatic and the secular-empirical, are selected as specially relevant to the present inquiry, since they have developed distinct conceptions of marriage which in turn have been reflected in the laws concerning divorce.

To understand this tripartite classification and to grasp the nature of the task which the author has set himself, it is important to note that the functioning of secular-dogmatic and of religious attitudes as dominating ideologies can be readily illustrated. The secular-empirical attitude, although widely adopted throughout the Western world, has not attained anywhere complete domination, but is always found side by side with religious attitudes. The dominant ideology in countries of the Western world is thus composed of elements taken from religious and secular attitudes in proportions which vary from time to time and from place to place. It may be more difficult to ascertain the ideological source and contents of the laws of Western countries than in the case of countries where either secular-dogmatic or religious ideologies dominate, but it is claimed that this difficulty can be solved by legal theory which provides

methods which will permit " the measurement of the degree of secularisation of the conception of marriage and of matrimonial legislation."

These methods are then applied in relation to a number of the established grounds for divorce, to divorce procedure and to collusive divorce. The results of this inquiry show in every instance that the divorce laws of the Western world, whether one considers each system as a whole or whether one takes the separate rules of which they are composed, are the products of a process whereby rules and institutions inspired by religion have been modified by secular influence or even secular rules have been affected by religious doctrines.

Summarised in this form the efforts of the author may appear to have been directed towards proving a foregone conclusion, but this impression would be false since it would fail to indicate the extent of his achievement in stating the major inarticulate premises of the law, or, to use the author's formula, to make explicit that which is implicit in the laws of divorce. On the other hand, the justice of the impression conveyed by a bare summary of this work cannot be denied entirely. The author has chosen to place in the centre of his work the antithesis of the religious and the secular although it cannot be expected that this antithesis can advance the understanding or the improvement of the laws of divorce. It would be useless and often quite impossible to deal in these terms with the vital issues of modern divorce legislation, such as whether divorce should be granted as redress for a wrong or as relief in cases of breakdown of marriage; whether the grounds for divorce should be separately catalogued or summarised in a general clause. These issues are indeed considered in the present study and at times the author even seems prepared to transgress the limits which he has set to his inquiry. These occasions yield interesting information, as in the account of Scandinavian attempts to give precision to the concept of breakdown of marriage, which appears to have led to a form of divorce by consent or even to unilateral divorce. He has also made some definite suggestions, as in the discussion of alcoholism and drug-addiction which in his opinion should not be admitted as grounds for divorce before rehabilitation has been attempted.

Many observations of this nature clearly suffer from being kept far too short even if it is conceded that they are only of marginal interest to the main theme of this study. It is after all improbable that less than one hundred pages of text should be sufficient to investigate adequately the divorce laws of the world, especially since the author has chosen to write in German, a language which does not seem to encourage brevity when used by legal authors. Sometimes brevity is carried almost to the point of dogmatism. Thus we are told that administrative divorce has become an anachronism which is condemned to extinction. The only evidence offered is a reference, admittedly inconclusive, to developments in Soviet Russia. No attempt is made to reconcile this assertion with the fact that in Denmark, according to the figures supplied, twelve out of every thirteen divorces are granted by administrative agencies—a surprising performance by a moribund institution! Again, when dealing with publicity of divorce proceedings, the author makes the valid point that it may induce the parties to manipulate the evidence, but he allows himself no space to pursue the matter and to ask whether publicity may not also act as deterrent against divorce.

The discussion of the problem of the general clause is more ample and accordingly more satisfying, even though the author has chosen to treat these clauses as admitting breakdown of marriage as a ground for divorce, which creates the risk of confusing two separate issues. General clauses, as he shows, do not mean easier divorce. They do not give more freedom to the individual but only enlarge the discretion of the judge. Constitutional objections to rule by discretion rather than rule by law explain therefore why many countries are reluctant to introduce general clauses. Here again, the argument would have been more convincing if account had been taken of the

indirect introduction of general clauses through extensive interpretation of *injures graves*, cruelty or desertion. This omission is surprising since the author, in another context, has shown himself to be fully aware of the elasticity of these grounds for divorce and also of the fact that some of them are the usual instruments of collusion. His apt comparison of the law with a dam which is broken at its weakest point through the pressure continuously exerted by those anxious to divorce might equally be applied to explain the force of a more legitimate demand for reform of the law.

The unbiased and humane approach which distinguishes the present work is seen to best advantage in the examination of the delicate topic of collusion. Of the many frank and penetrating observations which it contains, the most significant is perhaps the author's insistence that collusion could not be practised without the co-operation of the legal profession and of those judges who share the feeling that marriage and divorce concern the individual parties more than they concern the community. To prevent collusion it is necessary to change this attitude rather than to reform the law. The view that the answer to collusion must be found in tightening the law is dismissed as ignorant and emotional since divorce legislation is not a suitable instrument for social engineering. On this occasion the author's scepticism about the effectiveness of legislation may have carried him too far. No doubt, one cannot legislate for happy marriages, but it does not follow that therefore the legislator must accept collusive divorce with passive resignation, just as one would not expect this attitude to be adopted in the face of tax evasion.

J. Unger.

The French Legal System: An Introduction to Civil Law Systems. By R. David and H. P. de Vries. [New York: Oceana Publications. 1958. 152 pp. 42s. net.]

The object of this little book is to give American lawyers an insight into the working of the French legal system as an introduction to the general habits of legal thinking in the civil law world. To this end the authors rightly concentrate on the traditions, structure and techniques of the system, for it is in these, rather than in the rules of substantive law, that the real common element in the civil law systems is to be found. French law as much as English law is steeped in its own traditions and national characteristics, and not the least merit of this book is the way in which it emphasises such features while at the same time bringing into relief the essential concepts and techniques of the civil law, which are embodied in the French as in other civil law systems. As the authors state, the French legal system is the nearest and most direct bridge to the civil law world; yet by showing at the same time the individual and national character of French law the danger is avoided of misleading the reader into thinking that the civil law is a kind of universal code imposed *ab extra* on all civil law countries regardless of national peculiarities.

The contents of the book consist of a discussion of the codes and their background; the various branches of the legal profession; the political and judicial organisation of the country; the fundamental divisions of law; and the techniques employed in the formulation of legal rules. Thus in a very few pages the reader is given a genuine and illuminating insight into the structure of one of the leading civil law systems.

In the course of this short panorama there are so many points of exceptional interest to the English lawyer that only a few can be mentioned here. Thus he will find a very clear explanation of the position of the judiciary and its relation to the advocates on the one hand and the law professors on the other. Particularly he may be struck by the remark that "the French judge feels a

far closer kinship with the professor of law than with the *avocat*, whom he tends to regard as a mere rhetorician." Then he will find illuminating contrasts and comparisons in the discussion of the ways in which general rules are formulated in statutes and codes and thereafter transmuted or developed by judicial construction or interpretation. He will see the true function of *la doctrine* in French law and why its relation to case-law is so different from that between English juristic writings and judicial decisions. Yet at the same time he will learn that while judicial decisions are not by civil law standards a source of law as such, no instance has been found where the *Cour de Cassation* has overruled a prior decision of the full court; on the other hand, a good deal less weight is attached to decisions of lower courts.

It is interesting too to note that despite the cardinal role of public law in France, the system of training still tends to emphasise private law values, though this is partially if inadequately off-set by the incorporation of the political and social sciences into the Faculty of Law. This latter development, rather than the absence of judicial review of the validity of legislation, no doubt accounts for French constitutional law being regarded as more in the nature of political science than lawyer's law. From this point of view the minor importance in French law teaching vouchsafed to constitutional doctrine resembles the English rather than the American pattern; nor is the English student, brought up on Austin and Dicey, unfamiliar with the tendency to regard constitutional rules as differing from law properly so-called.

In short, this work can be warmly recommended as the best existing introduction to its subject for the English as well as for the American lawyer; it does therefore seem unfortunate that its price, even by American standards, is almost prohibitive for so small a volume.

Dennis Lloyd.

Outlines of Industrial Law. Third edition. By W. Mansfield Cooper and J. C. Wood. [London: Butterworth & Co., Ltd. 1958. lxvi and 413 pp. 35s. net.]

The first edition of this book appeared in 1947 and both then and in its second edition (1954) it earned unstinted praise from reviewers and an established place as an excellent students' textbook in this rapidly growing subject.

The new edition fully maintains the very high standards set by its predecessors, both in plan and execution. However some few matters of detail, some of them dating from the first edition, do call for comment.

In the common law sections there seems to be at times a preference for old and unsatisfactory cases when much better and more recent authority is readily available. Thus it is difficult to see why *Baxter* v. *Earl of Portsmouth* (1826) 5 B. & C. 170 is cited, at p. 32, when *Imperial Loan Co.* v. *Stone* [1892] 1 Q.B. 599 or *York Glass Co.* v. *Jubb* (1926) 134 L.T. 36 would have supported the text much more adequately. Again it is surprising that the much criticised *Kearney* v. *Whitehaven Colliery* [1893] 1 Q.B. 700 should be the only case cited on severance in contract. At pp. 131–132 the references to *Earl* v. *Lubbock* [1905] 1 K.B. 253 and *Winterbottom* v. *Wright* (1842) 10 M. & W. 109 might well have been accompanied by a reference to *Donoghue* v. *Stevenson*.

Surely *Gourley's* case is of sufficient importance to merit inclusion in any general survey of common law principles, however elementary? *McCarthy* v. *Daily Mirror* [1949] 1 All E.R. 801 might well have been mentioned in conjunction with *Deyong* v. *Shenburn* [1946] K.B. 227 and *Edwards* v. *West Herts. Hospital Management Committee* [1957] 1 W.L.R. 415 to give a full picture of the possible rights of a servant in respect of property stolen from him on the employer's premises.

Seduction receives a treatment that seems disproportionately full for a work on Industrial Law and in the discussion of "general hiring" at pp. 50–52 many of the old Poor Law cases might have been dropped to allow a fuller treatment of the very real doubt which arises on the more recent cases as to whether the presumption still exists or not.

Full account is not always taken of statutory developments. Thus the reference to *Whincup* v. *Hughes* (1871) L.R. 6 C.P. 78, at p. 91, should be accompanied by a reference to the Law Reform (Frustrated Contracts) Act, 1943. The reference to limitation of actions in relation to contracts, at p. 84, could have carried a reference to the 1954 Act. The extended citations from *Horton's* case, at p. 319, should carry a cautionary reference to the Occupiers' Liability Act, 1957, and the statement, at p. 158, of the Parliamentary procedure for bringing into force regulations under the Factories Act, 1937, fails to note the Statutory Instruments Act, 1946. A period of forty days should be substituted for twenty-eight.

Other minor infelicities can be found. Thus the treatment of *Diggle* v. *Ogston* (1915) 84 L.J.K.B. 2165, at pp. 73–74, may mislead the unwary and unfortunate phrasing, at p. 29, might lead one to suppose that all contracts for an infant's benefit are binding upon him. In the introductory sentence on loss of service due to personal injury, at p. 122, the master appears to be given an action against the servant (and not the the third party) in respect of a tort committed to the servant by a third party. *Smith* v. *Cammell Laird*, cited at p. 185, went on appeal to the House of Lords and the Court of Appeal decision was reversed [1940] A.C. 242. *Fowler* v. *Kibble*, cited at p. 396, went to the Court of Appeal in [1922] 1 Ch. 487 (this is noted in the Table of Cases) where the relevance of violence to the decision was doubted. *John Summers* v. *Frost* [1955] A.C. 740 should supersede *Pugh* v. *Manchester Dry Docks* [1954] 1 W.L.R. 389, at p. 167. At p. 333 *Harrison* v. *N.C.B.* [1951] A.C. 639 should be accompanied by a reference to section 159 of the Mines and Quarries Act, 1954, and since *Stapley* v. *Gypsum Mines* [1953] A.C. 663 the case of *Manwaring* v. *Billington* [1952] 2 All E.R. 747 can no longer be explained on the basis of causation. A reference to recent suggestions for the amendment of Truck legislation would have given a finishing touch to the social and historical background to these Acts.

Misprints are few and the standard of production is excellent. As will be seen from the illustrations given, the text still lacks the final polish necessary to confirm the work in the place of unquestioned pre-eminence which its great qualities merit. The defects are, on the whole, more irritating than important and are brought into high relief by the exacting standards by which alone the book deserves to be judged.

A. H. HUDSON.

DROIT DU TRAVAIL. By A. BRUN and H. GALLAND. With a Preface By A. SIEGFRIED. [Paris: Sirey. 1958. vi and 1053 pp. £9 10s. net.]

THIS excellent work is the result of the joint efforts of an academic lawyer and of a practitioner. Professor Brun teaches labour law at the University of Lyon and is the director of its Institute of Labour Law and Law of Social Security. M. Galland is a practising advocate before the *Conseil d'Etat* and the *Cour de Cassation*. The book fills a very obvious gap in the French literature on labour law. That literature is voluminous and of very high quality. But there had been no medium sized work, occupying a place half-way between a "Petit Précis Dalloz" and the monumental three-volume treatise by Durand. It may be of interest to summarise the principal contents of a French book on this subject intended for the use of students as well as of practitioners. The work is divided into three main parts: In the first part the authors give a survey of the foundations of labour law: this contains a

historical survey, including a discussion of the various political philosophies which have gone into the making of French labour law, a detailed analysis of the sources, *i.e.*, the constitution, statutes, subordinate legislation, case law and legal doctrine, autonomous sources (custom, collective bargaining), and international sources (the I.L.O. and its work), and possible conflicts between these sources. It further contains a descriptive analysis of the administrative and judicial authorities entrusted with the enforcement of the rules of labour law, and a highly interesting chapter on the "characteristics of labour law" (imperative nature, role of autonomy, etc.). The second part is a detailed discussion of the contract of employment in all its aspects, structure, distinction from other types of contract, formation and validity (including the role of the labour exchanges), content, enforcement and termination. The third part deals with collective relations: trade union law, collective agreements, the enterprise and its constitution, disputes and their settlement. Throughout the work the student's attention is drawn to the social policies and formative ideas which influenced the development of the law. The work is refreshingly practical in its outlook, and does not suffer from the overestimation of academic controversies which one sometimes encounters in French treatises, nor from that of judicial utterances which is so common in this country. The reviewer has the book in frequent use, and has found it most valuable as a source of information and stimulating as an exposition of principles and developments.

The late André Siegfried concluded his inspiring preface with the following words:

> "I do not believe that one could have chosen a more fascinating subject or a subject whose significance is more far-reaching. I do not know of any topic which lends itself to the same extent to reflections on the nature and evolution of our social structure, on the profound tendencies of a destiny of which Valery has said that it constitutes 'a great adventure.'"

The great adventure is what in a previous passage M. Siegfried calls "the astonishing technical, economic, and social revolution which the contemporary world has undergone in the last two centuries." The "legal repercussion" of this revolution André Siegfried found in the subject of this book.

Obviously it is a subject considered to be of some little educational significance in France. The work under review will greatly assist those interested in teaching, in learning and in applying it.

O. Kahn-Freund.

Conférence de la Haye de Droit International Privé: Documents et Actes de la Huitième Session, 3 au 24 Octobre, 1956. [The Hague: The Permanent Bureau of the Conference, 1957. Two volumes. Price not stated.]

The first of these volumes contains the documents which were distributed to governments preparatory to the meeting of the Eighth Session of The Hague Conference on Private International Law, 1956, together with a number of observations and comments made thereon by the governments concerned. The second volume provides a complete report of the proceedings of the Eighth Conference and the text of the draft conventions and recommendations adopted by it.

The Eighth Conference continued the work of previous sessions in the field of international contracts for the sale of goods and adopted a draft convention on the law applicable to the transfer of ownership of movables, as well as a convention on the effect of the express designation by the parties in their contract of a court to which eventual disputes arising under that contract should be submitted. The Conference also drew up two conventions dealing with maintenance obligations towards children, one on the law governing such

obligations and the other on the enforcement of foreign maintenance orders made for the benefit of children.

This was the second Conference which British delegates attended no longer as mere observers but as members. Both Professor Graveson and Professor Wortley took an active part in the discussions and their views were clearly welcomed and valued by other delegates. It is therefore disappointing that the progress in the field of the unification of private international law which many hoped (albeit somewhat rashly) would result from the full British membership of the Conference has not been made. The British delegation was the only one to abstain from voting on all four conventions. The reasons for this abstention are not always clearly formulated in the report and can but partially be found in the gulf between civil and common law. One stumbling block was provided by the absence of machinery in this country for the enforcement of foreign judgments except as legal debts to pay a sum of money. The other and kindred difficulty was caused by the apparent unwillingness of English courts to treat a foreign maintenance order as "final and conclusive" because of the possibility of subsequent variation. Despite the fact that English law seems in these respects to be less satisfactory than the laws of continental States the British delegates did not hint at any prospect of reform.

It is not easy to conclude the reading of the report without feeling that the British delegation (still one of the smallest at the Conference) was much more conscious than the delegations from other countries of the difficulties in the way of achieving such domestic changes as would make possible the adoption of the conventions by this country. Whether in effect the cause for the British abstention was the knowledge of the impracticability of securing necessary changes in English law to meet the continental viewpoint or official scepticism as to the value of the Conference as the medium for the unification of private international law or, finally, the absence from the Conference of other common law countries (for the first time American delegates attended as observers), some doubts may be felt as to the purpose, in these circumstances, of the continued British membership. It could be said that instead of introducing a discordant note in the continental debates greater effort should be made to improve conflict rules in the common law family and that it might be better to aim at an objective which, though limited, is within immediate reach. As long, however, as the pursuit of the final goal does not interfere with the achievement of the lesser one, it would seem that ultimately only good can accrue from the widening of the membership of the Conference and the increase of contacts between common lawyers and civilians. But that such reflections should be possible as a result of the experience of only two Conferences is a matter of regret to all concerned with the development of the law. The adventures of the recent Domicile Bill leave little room for optimism.

J. K. Grodecki.

The Evolution of the Judicial Process. By The Hon. James C. McRuer, Chief Justice of the High Court of Justice for Ontario. [Canada: Clarke, Irwin & Co., Ltd. 1958. xi and 115 pp. 25s. net.]

This slim volume contains three lectures given in 1956 at the University of Saskatchewan by Chief Justice McRuer. They are the first in a new series of W. M. Martin Lectures, inaugurated in that year under the auspices of the Law Society of Saskatchewan, in order to encourage the advancement of legal studies in the College of Law of the University, and the perpetuation of the "rule of law" in the Government of Canada and her provinces. The Chief Justice is primarily concerned to trace the evolution of the judicial process as it is applicable to Canada, and in his first lecture he gives a brief

account of the main landmarks in the historical development of the judicial system. Naturally he dwells mainly on English legal history, and his account is enlivened by descriptions of such cases as *Ashford* v. *Thornton* and *Bushell's Case*, but he pays due attention to earlier roots of the legal system in Babylon and Israel. The second lecture, entitled "Contemporary," is comparative in nature, for the author describes in outline the courts and systems of England, Canada, the U.S.A., a number of Western European countries, the U.S.S.R. and China. Because of its influence on Quebec, particular attention is paid to the French system, and some historical matter is included for this purpose The Chief Justice's intention is to show that Canada and England can both learn from experience and practice in other countries, just as such law reform as has already been accomplished in England took place over a period of many centuries, during which countless people suffered harsh injustices. The third lecture is of a rather different nature, and deals with the history and possible future development of international judicial process. The author considers it essential, in view of the threat of terrible worldwide destruction which hangs over us all today, that such process be sure and settled, and that all nations should recognise its jurisdiction over both disputes between countries and also an international criminal law. Thus he regards the Nuremberg Tribunal as having been properly constituted and having performed a necessary duty.

The book is intended for the general reader, but law students can read it with profit. The Chief Justice writes in a flowing style, with humour and many happy turns of phrase; and his thesis is a stimulating one. At the end of the book is a short bibliography which includes works from Sir James Stephen to Dr. Goodhart, and from Plato to Shakespeare and Sir Winston Churchill. The notes (pp. 107–112) might perhaps more conveniently have appeared as footnotes on each page. The reviewer noticed only one misleading statement needing further explanation, namely that "The judges on circuit may try chancery cases as well as divorce cases . . ." (p. 70).

D. C. M. Yardley.

The Supreme Court as Final Arbiter in Federal-State Relations, 1789–1957. By John R. Schmidhauser. [North Carolina University Press. London: Oxford University Press. 1958. ix and 241 pp. 40s. net.]

Dr. Schmidhauser had two objects in writing this book, first to investigate the origin of the United States Supreme Court's power in deciding cases concerned with federal-state relations, and secondly to analyse the manner in which the Court has exercised this power. The author is a political scientist, and he purposely uses the term "arbitration" as describing more appropriately than "adjudication" the essentially political aspect of the Supreme Court's role in federal-state relations. The first chapter is devoted to the origin of the Court's authority in this sphere. He emphatically denies that the function of the Court is merely "judicial usurpation" for which there is no authority—an argument which still persists today, and which came into prominence after the school segregation case of *Brown* v. *Board of Education* in 1954. Dr. Schmidhauser points out that in any federal country there must be an institution to determine conflicts between the nation and the constituent states. In the U.S.A. this institution is a judicial body, in many respects a prototype for that in the younger federations of Canada, Australia and West Germany. The power of the Supreme Court in this field might be said to be inherited from the Committee of the Privy Council on Trade and Plantations which, in Colonial days, resolved conflicts between the colonies and the mother country. The author traces the disputes on the question before and during the famous

Philadelphia Convention. Those states' leaders who feared the encroachments upon their powers of a strong national government looked upon a firm judicial system as a protector of the individual, while the federalists eventually agreed to this principle as the Court's power should also prove to be useful in restraining the states. Dr. Schmidhauser submits that the record of the Convention indicated unmistakably that the new Supreme Court had been designated the final judicial arbiter in federal-state relations, yet, as is well known, no express conferment of this power actually appeared in so many words in Article III of the United States Constitution. It is interesting to find that the spokesmen of the very interests that later argued against the validity of this power were originally the instigators of it.

Having disposed of his first problem in one chapter, Dr. Schmidhauser then spreads himself in the remaining ten chapters of the book in considering the various ways in which the Court has exercised its authority. This study is conducted by examining the decisions of the Court, and he demonstrates well the mastery he has attained in the use of law cases. The author divides up the periods of the Court's history into the eras of the successive chief justices, admitting that the prevailing view in the Court did not necessarily alter on the demise of each chief justice, but finding that by and large the influence of each was such that any dividing lines which can be drawn occur roughly at the times of the appointments of new holders of the office. During what Dr. Schmidhauser calls the "formative decade" of 1790–1800 the universal confidence in the Court was gradually shaken. President Washington only appointed staunch nationalists or federalists to the Court, and the states became conscious of the growing power of the Court to uphold the principles of national supremacy over the states. Under the Chief Justiceship of John Marshall (1801–1835), the federal power was consistently sustained where it conflicted with that of the states, with the exception of one decision limiting federal admiralty jurisdiction, and of some of the later contract and commerce clause cases. The Taney Court (1836–1864) has sometimes been regarded as having reversed this policy, but on an analysis of the cases the author shows quite convincingly that it nevertheless maintained the same principle of federal supremacy during very trying times. It was certainly more restrained than the Marshall Court in keeping the balance between the nation and the states, and it tried as far as possible to allow the states the fullest possible freedom of control of their social and economic affairs. Dr. Schmidhauser regards the *Dred Scott* decision as the unfortunate occasion for some fundamental differences in social outlook among the members of the Court boiling to the surface. The Chase Court (1864–1873), rather than the Taney Court, was, in the author's opinion, the outstanding "states' rights" Court in American judicial history. On the whole it was weaker than its predecessors, and some of its decisions were contradictory, but it did have an awareness of the need to preserve the states intact as part of the federal system, and it tended to protect the states from strong, and natural, federal pressures which followed in the wake of the Civil War, even though it sometimes went too far in that direction. Under Chief Justice Waite (1874–1888) this policy was largely continued, but in cases on the due process clause the Court did evolve doctrines which were destined to revolutionise federal-state relations by opening the way for federal judicial censorship of the legislation of the states. Perhaps the high water-mark of favour shown to the federation was reached in the period of the Fuller Court (1888–1910), for the Court used the due process clause of the Fourteenth Amendment as the lever for a vast expansion of federal judicial supervision over the legislation and actions of the states. In this and other fields the Court modified the federal system in the direction of centralisation far more than any Court before it. This process continued under Chief Justices White and Taft (1911–1930), save that the federal commerce and taxing powers were construed narrowly, thus setting a limit on federal power in those areas of the law. The author divides up the Chief Justiceship of Charles

Evans Hughes (1930–1941) into the period up to 1937 and that after 1937, for in that year the Court finally took the step which brought it into line with the policy of the " New Deal." It began to construe federal taxing and spending powers broadly, but it also abandoned some previously held doctrines surrounding the due process clause and the former rigorous supervision of state economic legislation. This policy has been continued up to the present day under the successive Chief Justiceships of Stone, Vinson and Earl Warren, and the author concludes his study with a note of satisfaction that the Court is now apparently fully aware that it must both maintain proper federal authority and also safeguard state autonomy wherever possible.

A Bibliography appears at the end of the volume, and there is also a Table of Cases and an Index. The Table of Cases is full, even including some cases which do not appear in any series of Law Reports, but it is a pity that no references are given in the Table to the relevant pages in the text. This means that the reader cannot just look up odd cases. He must locate the period of the case, and then plough through a chapter until he comes upon it. The Index is perhaps not as satisfactory as it might be, as about 90 per cent. of the entries in it are merely names of people. But the book makes stimulating reading, and it is attractively produced.

D. C. M. Yardley.

Potter's Historical Introduction to English Law and its Institutions. By A. K. R. Kiralfy, ph.d., ll.m. Fourth edition. [London: Sweet & Maxwell, Ltd. 1958. xxxii and 675 pp. £2 5s. net.]

Potter's Outlines of English Legal History. By A. K. R. Kiralfy, ph.d., ll.m. Fifth edition. [London: Sweet & Maxwell, Ltd. 1958. xvi and 285 pp. 25s. net.]

The fourth edition of *Potter's Historical Introduction* is the first to appear since the author's death, and the work of preparing it has been put in the very capable hands of Dr. Kiralfy. One of the great assets of the author was his clarity of expression, and it is perhaps a measure of the present editor's success that he has not merely retained that attribute, but also contrived to introduce such new material as here appears with like clarity. Indeed such deletions and corrections as he has made in Professor Potter's own text have been by way of either pruning or eliminating misprints and occasional ambiguities, etc. Thus this book remains essentially *Potter,* which is as it should be. If an editor should find that the original scope, scheme and execution of a book needs radical alteration it is usually an indication that the work should not in fact be re-edited at all, but that an entirely new work should be produced. Of course this suggestion really applies more aptly to some of the older textbooks on the present-day law than to those on legal history, where such changes as have to be made are more likely to be in the light of recent research than for any other cause, and the results of such research only appear slowly and infrequently.

Dr. Kiralfy has fully maintained the traditions of the old *Potter,* which was first published in 1932. The scheme of the book remains the same, Part One being introductory, Part Two dealing with the history of the courts, Part Three the history of the substantive common law, and Part Four the history of equity. Part Two is supplemented by an Appendix in which the various courts, past and present, are set out in table form. Even the Court of Chivalry and its parent, the Court of the Constable and Marshal, receive a little table of their own—the revival of the Court of Chivalry in 1955 necessitated a brief remark upon it in the text on p. 81. Some additions have been made to the sections on borough courts, the law merchant and the

Chancery, and to the chapter on the jury system; and modern administrative tribunals receive special attention. Most of the textual alterations are, however, in Parts Three and Four, the latter being reduced in length by judicious use of the editorial scissors. The section on Year Books has been revised in the light of knowledge available since the last edition, in particular through the work of the Selden Society, under whose auspices appeared, for example, the *Register of Year Book MSS.* in 1956. Additions to the section on early law reports were necessitated by, for instance, the publication of information on Keilway's Reports by Mr. Simpson in the *Law Quarterly Review.* A section has been added on statutes as a source of law. Passages have been rewritten in the chapters on the forms of action and the history of tort, and, as was to be expected, copious references are made here and in the chapter on the history of contract to Dr. Kiralfy's own book, *The Action on the Case.* What appears to be a major surgical operation is the separation of the treatment of tort from that of crime, but in fact the vast majority of the text remains as it was in the last edition, with little change other than some rearrangement of the material. On the other hand a departure from Professor Potter's own ideas is to be seen in the inclusion of short sections on the history of specific crimes, principally treason, homicide and larceny, but also, together in one section, rape, arson, forgery, libel and related offences, and attempted crimes. One small, but highly significant, addition to the book is a very brief seven-page Appendix on the law of persons. As the editor truly says in his Preface, the lack of any treatment of this subject "is characteristic of most recent treatises on legal history." This Appendix is modest, but perhaps it will be the precursor of more ambitious efforts to deal with the history of this subject in legal history textbooks. Dr. Kiralfy divides the Appendix into sections on husband and wife (marriage, divorce—such as it was till 1857—and the legal status of married women), infants (the age of majority, parental rights, guardianship, infants' liability and the power to sue, legitimacy, legitimation and adoption), corporations (methods of incorporation, the different types and powers of corporations, and the position of unincorporated bodies), and obsolete forms of status (outlawry, civil death of monks and nuns, forfeiture after conviction for felony, etc.)

In one particular way the editor has probably improved the book, for he is far less reticent to air his views upon problems on which conflicting theories exist than was Professor Potter. This may be seen, for example, in the discussion on the origins of trespass and case. It is perhaps odd, however, that, although taking note of recent articles connected with the subject, such as those by Mr. Hall and Mr. Milsom, the editor fails to refer at all to the chapters in Fifoot's *History and Sources of the Common Law*, which deals with the topics in, at the very least, an interesting way and quite fully. On the whole, however, Dr. Kiralfy has referred where desirable to Mr. Fifoot's book and to his own, *A Source Book of English Law.* He explains in his Preface that this present edition of *Potter* and the *Source Book* were intended to be companion volumes, but that the *Source Book* had to be printed first so that page references could be given in *Potter.* He hopes, therefore, that the publication of this edition will meet the criticisms that have been made that the *Source Book* was not provided with a commentary. Finally, Dr. Kiralfy has provided a Table of Statutes, missing from earlier editions, and a new Table of Year Book Cases, organised in series—Black Letter, Rolls Series, Ames Foundation and the Selden Society series.

There has been a gap of fourteen years between the publication of the last edition of *Potter's Outlines* and the present one, but it is not the type of book which needs a new edition very often. It might be called an epitome of *Potter's Historical Introduction*, though originally the latter work was an expansion of the former and appeared nine years after the first edition of the *Outlines.* The scheme of the two books is almost exactly the same, but in the smaller work only the merest outline is given of each subject. Again

clarity is one of its great merits, and it remains useful in providing the student with a first glimpse of the subject and an idea of its scope. Few changes have been necessary in this edition, though some new illustrations of points made have been inserted. Places are found for the Restrictive Practices Court, the Crown Courts of Manchester and Liverpool, and the effect of the County Courts Act, 1955. The tables of courts in an Appendix are almost identical with those in the *Historical Introduction*, save that the Court of Chivalry and its predecessor do not appear.

One small fault appears in both books, namely that the abbreviations grouped together in the Lists of Abbreviations do not always tally with those used in footnotes to the text. Thus on p. 208 of the *Historical Introduction*, Holden's *The History of Negotiable Instruments in English Law* is abbreviated, yet no such abbreviation is included in the List. And on p. 189 of the *Outlines* an abbreviation for Ames' *Lectures on Legal History* is used which appears in the List for the larger book, but not in the List in the *Outlines* itself, where a different abbreviation is indicated. But this is a minor matter, and we are greatly in Dr. Kiralfy's debt for his labours on these two volumes.

D. C. M. Yardley.

Prideaux's Precedents in Conveyancing. Vol. I. Twenty-fifth edition. By the late T. K. Wigan and I. M. Phillips, Barristers-at-Law. [London: Stevens & Sons, Ltd., and the Solicitors' Law Stationery Society, Ltd. lxi and 826 and (Index) 115 pp. £6 6s.]

W. S. Gilbert told an earlier generation, but the words still run in the text of Sullivan's opera, that everyone is either born a Conservative or a Liberal—for "Liberal" today a *varia lectio* is "Labour." For many years it might well have been said that everyone here who was a Conveyancer was either a devotee of *Key & Elphinstone* or of *Prideaux*, yet on the analogy of music, in respect of which it has often been said that one could either be a devotee of Bach or Handel, or Wagner or Brahms, but not a devotee of either pair, experience has proved that these generalisations have been wide of the mark. Certainly in the sphere of Conveyancing this is particularly true since the 1925 edition (the 22nd) of *Prideaux*, for with the approaching advent of the 1925 Property Legislation the value of guidance was so fully appreciated that it was sought from not merely one quarter but from all, and a certain halo attached thereto by reason of its senior editorship being in the hands of the late Sir Benjamin Cherry, whose association with the framing of the 1925 Legislation was common knowledge. The 23rd edition (1936) brought something of the *Key & Elphinstone* tradition into its "opposite number" *Prideaux* by reason of the joint editorship thereof of Sir Lancelot Elphinstone, son of Sir Howard Elphinstone, the Elphinstone of the original "K. & E." The 24th edition (1952) represented the monumental editorial task of the late J. B. Richardson, a single-handed production, and one which by reason of his association with several titles of the *Encyclopaedia of Forms & Precedents in Conveyancing* afforded a personal link with the methods and practice of that many-volumed collection. The present (the 25th) edition, the first volume of which has just been published, returns to the joint editorial system, Vol. I being edited by the late Mr. T. K. Wigan and Mr. Ivor M. Phillips. Mr. Wigan was at the time of his lamented passing away one of the Conveyancing Counsel of the court and had agreed to become general editor of this new edition. Mr. Phillips' preface observes, "his untimely loss has deprived his editors and publishers of his wide experience as a Conveyancer, but it is fortunate that he was able to complete the part of this volume, the Dissertation

and the Conditions of Sale, for which he was personally responsible, and to make various suggestions relating to the second half of the volume, as well as contributing some of the Forms." In *Prideaux* the latter word is to be construed strictly, as a distinction is drawn therein between Forms on the one hand and Precedents on the other. Mr. Phillips adds "Although we collaborated, it was not until I read the proofs of the first half of this volume that I realised fully the great amount of work Mr. Wigan had put into his task. He rewrote the greater part of the Dissertation and it is thought that his Chapter 8 dealing with Restrictive Covenants will promote understanding of a difficult subject. He made a point of relating the Special Conditions of Sale and the subsequent conveyances to one another." This is a generous and merited tribute to the work of a colleague whose identification with *Prideaux* adds to the established prestige of a conveyancing classic which has passed its century of first production by over five years. Nevertheless, the immense burden placed upon Mr. Phillips of completing more than half of the volume will be readily appreciated, a burden which Mr. Phillips has sustained with consummate ability and conspicuous success.

Part I of Chapter 1 is devoted to the Transitional Provisions of the 1925 legislation which, it is submitted, will probably for many years to come still sometimes be necessary for the investigation of title starting before 1926. Pages 1 to 244 constitute, according to the *Prideaux* tradition, a treatise on conveyancing practice and the law associated therewith in relation to sale and exchange of property in land. It is well annotated referentially. At p. 58 in the admirable Chapter on Contracts for Sale there is a section devoted to Charity Trustees. This is a model of conciseness but one will have to await the publication of Volume 3 in order to find the full treatment of this most complex of subjects within the ambit of *Prideaux*. The outstanding Chapter in this edition is that of Chapter 8 on Covenants—a masterly presentation which analyses and epitomises with lucidity and meticulous care the "Burden" and the "Benefit" the "Power to release or vary the Remedies," the referential statements of the principles expounded in *Renals* v. *Cowlishaw* (1878) 11 Ch.D. 866, *Spicer* v. *Martin* (1888) 14 App.Cas. 12, *Elliston* v. *Reacher* [1908] 2 Ch. 374 and *Reid* v. *Bickerstaff* [1909] 2 Ch. 305, being illustrations of the treatment.

At p. 208 in citing the four requisites of a Building Scheme as laid down by Parker J., as he then was, in *Elliston* v. *Reacher* (*supra*), it might there have been usefully added the fifth enumerated in *Reid* v. *Bickerstaff* (*supra*), namely, that the area to which the scheme extends must be clearly defined, a principle for which the latter case is the leading authority. (Incidentally at that page the defendant has a redundant "e" to his name.) The treatment of positive covenants is particularly noteworthy, and here it may be observed that the nomenclature of these covenants varies slightly, being termed "positive covenants" in the Chapter in question, but "affirmative covenants" at points in the notes to the Forms and Precedents—this is mentioned because in the Index the references are exclusively to "Affirmative Covenants." However, there is high authority for saying that "a rose by any other name smells just as sweet."

Coming to the Forms of Recitals, one notes that they have been increased in number, and include development in legal practice consequential upon the increasing legislation relating to Town Planning, especially in respect of user, and the Town Planning notes and the Conditions in respect of them should be carefully considered. The Recitals relating to Assents and Vesting Assents and the notes thereon have been well presented. After the Forms of Parcels there are some very useful Miscellaneous Forms. The Notes to Conveyances on Sale under the Settled Land Act, 1925, are quite voluminous, and of great value in practice.

At p. 723 it is observed that the provisions of the Law of Property Act, 1925, s. 4 (3) in respect of a right of re-entry in relation to Perpetual

Rent Charges are not clear, and accordingly it will be prudent to limit the time to a Royal period in regard to the perpetuity Rule and the reference is to His late Majesty King George V.

The editors appear to have no faith in the view that where the Personal Representatives and the Assentees are the same person no written Assent is necessary and the county court judgment in *Harris* v. *Harris* [1] which contains a full exposition in support of the view is not cited. In this behalf it is of interest to scrutinise the Conveyance on p. 592 which is a Conveyance of Freeholds to a purchaser where the vendor is devisee for his own benefit subject to debts and legacies and also executor. The vendor here contracts to sell as executor, but conveys as beneficial owner with habendum discharged from the trusts and provisions of the recited will. It must be left for adherents to *Harris* v. *Harris* (*supra*) to take up the cudgels in respect thereof in relation to the question as to the statics and dynamics of the legal estate in the vendor in question. Some clue is afforded by the fact that the will is brought on the title by recital and a note explains that if the devisee and executor are different persons, the devisee cannot now make title till the executor has in writing assented to the legal estate vesting in him and that if such an assent has been made the will does not come on the title and there would be a mere recital of the "seisin" of the vendor. This is all common ground, but the vendor here would appear to have changed his status on conveyance, unless, as is probably to be assumed, while he still sold as executor, he took upon himself the burden of covenants for title with which normally an executor would not saddle himself.

The attitude taken up by the editors of this volume is in line with those of Vol. 3 of the preceding edition, where the view that *Re Hodge* [1940] Ch. 260 supports the proposition that where the personal representatives and the persons in whose favour an Assent is required are the same (though the capacities in which they hold may change) the Assent may still be implied and not be in writing is regarded as wholly unsound (Vol. 3, p. 867). Yet *Re Hodge* would seem to be the clue to the conveyance last mentioned.

There is an excellent note to the Conveyance of Freeholds by the survivor of two joint tenants, with helpful references to current literature on the subject (p. 464). At p. 418 the editors note that opinions differ whether an Assent made to an admittedly wrong person passes the legal estate under the Administration of Estates Act, 1925, s. 36 (1) and (4).

A feature of the new edition is the noting of the adaptation of many of the Forms to Registered Land, an important point in view of the increasing areas of compulsory registration of title, and the consideration of conveyancing under compulsory purchase. Attention has also been given to the conveyancing in relation to freehold flats and to stamps.[2]

In contrast to many other law books, the new edition is only ten pages longer than its predecessor.

Appropriate omissions have been judiciously counterbalanced by appropriate accessions.

The predominant spirit of this edition is a prudent caution and adventurous if attractive flights are avoided. The new *Prideaux* will become an invaluable replacement in the Conveyancer's library. Guidance throughout is the keynote. It is a well-produced volume, with a serviceable index as well as Table of Contents and full Tables of Cases and Statutes. The one criticism that comes to mind on surveying the book as a whole is that it would be an improvement in subsequent editions if the printing of the numbers of the notes were in thicker type and darker ink—they are not very easy to decipher on

[1] 1942 L.J.N.C.C.R. 119 and discussed at length in Williams on *Assents*.

[2] The footnote reference to "Stamps" in the Index should read p. 236, not p. 249.

quick reference and Conveyancers' eyes do tend to become tired. Nevertheless, the publishers are to be congratulated on this renewal of a Conveyancing classic. The continuance of the *pietas* of printing the names of editors of all the editions perpetuates a worthy tradition.

Bertram B. Benas.

Bullen & Leake's Precedents of Pleadings. Eleventh edition. Editor: L. L. Loewe, m.a.; Consulting Editors: R. F. Burnand, c.b.e., o.b.e. mil., m.a., and I. H. Jacob, ll.b. [Sweet & Maxwell, Ltd. 1959. cxcix and 1,134 and (index) 52 pp. £7 7s.]

The first thing which strikes one about the new edition of this famous work is its vastly improved layout. The precedents are numbered; the notes immediately follow them and are classified according to whether they deal with the substantive law or particular matters of procedure; the pages have headings which make reference easy; and the binding is attractive. These changes by themselves would be sufficient cause for welcoming the new edition. In the past *Bullen & Leake* has been rather indigestible and forbidding in appearance.

The distinguished editors, with the assistance of a number of experts in particular fields, have also undertaken a thorough revision of the precedents themselves, pruning obsolete forms and adding new ones as required. In this they have been in a large measure successful. The precedents deal with events which most commonly lead to modern litigation, as well as covering in modern style the less frequent types of action.

In a number of respects there is still room for improvement. Thus in dealing with personal injury claims the pleader is often puzzled how to deal with income tax and national insurance in relation to the special damage. No precedent shows how these matters should be set out. Indeed, income tax is only referred to in the introductory chapters and in relation to wrongful dismissal, and national insurance only in relation to fatal accidents. The reviewer could find no reference in the index to national insurance or to the discussion on income tax in the introductory chapters. Again, in searching for a precedent for breach of warranty claiming a declaration of indemnity against damages payable to third parties, no reference could be found in the index though the point was finally tracked down in a note on p. 343. Some of the landlord and tenant precedents end without specifying the relief claimed or giving any guidance on the point. Precedents relating to patent actions are given, excellent in themselves, but with no warning that such actions are assigned to the Chancery Division, although the book purports to be a book of precedents for use in the Queen's Bench Division. The note at the heading of the section on Statements of Claim in Libel and Slander actions rightly stresses the undesirability of "so-called innuendoes which merely repeat the obvious meaning of the words in other language." But Precedent No. 418 contains precisely such an innuendo, although a note is added to say that it is unnecessary. It might have been more helpful to give a precedent of a case where an innuendo was really necessary with an example of the sort of particulars required.

Nevertheless, these criticisms relate to a small proportion of the 1,101 precedents provided, and in general the combination of modern layout and modern precedents makes this edition a notable milestone in the history of the book.

John Montgomerie.

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS. Edited by Members of the Court. Vol. 7. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1958. viii and 492 pp. 34 DM.]

THE decisions of the German Federal Constitutional Court continue to constitute a faithful mirror of the ideological, social, economic and political conditions in Western Germany. The present volume contains no less than forty-six judgments all issued within the period of a single year. This in itself may be taken to be a significant fact, particularly if it is remembered that the work of the Federal Constitutional Court is supplemented by that of the various Land Constitutional Courts. One has the impression that the mere quantity of constitutional legal work proves that something is basically wrong: either the constitution of the Bund and the various Länder does not receive sufficient respect from the government departments, or it is too vaguely expressed or perhaps parliamentary control is as yet not as effective or possesses less moral force than it should.

The volume opens with a judgment which throws significant light on the legal position in Berlin: the court held that its writ does not run in Berlin. One may well speculate whether the inclusion of Berlin would not have further swollen the number of constitutional conflicts. The longest judgment in this volume deals surprisingly with a problem that—at least from a functional point of view—has some connection with the problem of monopolies and which contains a significantly large number of considerations which come near to those on which the Restrictive Practices Court based its decision in *Re Chemists' Federation Agreement (No. 2)* [1958] 1 W.L.R. 1192. A Bavarian law of 1952 had provided that a pharmacist's opening of a new shop required a Government licence which would only be granted if it was in the public interest that a new pharmacy should be opened, if the latter would be certain to have a sufficient amount of business and if it would not interfere with the business of pharmacists already in business in neighbouring places to such an extent that the position of the latter would be endangered. The court held that this law was incompatible with the principle of freedom of commerce as laid down in section 12 of the Basic Law. The plaintiff, a fully qualified refugee from the Soviet Zone, was therefore entitled to start business as a pharmacist without requiring a licence. The court made extensive investigations into the position of qualified pharmacists in other European countries and laid particular stress on the fact that no similar restrictions existed in Switzerland.

The struggle around Herr Harlan, the producer of the Goebbels-inspired film "Jew Suess," too, could, of course, not fail to reach the Constitutional Court. Dr. Lüth, a noted protagonist of German-Jewish reconciliation had spoken some remarkably frank words about Herr Harlan, whereupon the district court of Hamburg issued an injunction forbidding Dr. Lüth to repeat his remarks. The Constitutional Court was seised of this matter by way of a clause in its rules of procedure enabling anybody to bring immediately before the court and without using the ordinary remedies any matter relating to the infringement of constitutional rights which is of general importance. The Constitutional Court held that the judgment of the Hamburg court infringed the basic principle of freedom of speech in the exercise of which Dr. Lüth had made the remarks under consideration and the judgment had to be set aside.

A number of decisions deal with what may well be considered to be a particularly clumsy attempt on the part of the opposition parties to undermine the authority of the Federal Government. The Federal Parliament having rejected a motion that the Federal Government should renounce the use of atomic weapons, the opposition abused its majority in a number of Länder by passing in a number of Land Parliaments statutes ordering Land plebiscites on the same question. The Constitutional Court by way of a provisional decree ordered that these laws should not be carried into effect pending the decision

on the question whether they were permissible under the Basic Law. The matter will, no doubt, engage the attention of the court once more when it will come up for a final hearing. The attitude of the Land Socialist parties, which are responsible for the introduction of these statutes, goes some way to show that part of the burden which the court has to carry is due to the lack of understanding of democratic self-discipline, even on the part of those who proclaim themselves as champions of democracy. The court's educational tasks are extensive and numerous. Experience makes one inclined to think that they will not be speedily solved.

E. J. Cohn.

Financial Problems of the Family Company. By A. R. English, A.C.A. With a Foreword by Lord Piercy of Burford, C.B.E. [London: Sweet & Maxwell, Ltd. 1958. x and 164 pp. 21s. net.]

This little book is written by a chartered accountant on the staff of the Industrial and Commercial Finance Corporation. It explains what family companies should do if they want to raise capital from the I.C.F.C. and similar institutions and deals briefly with the legal and commercial problems which they will then meet and suggests how they can best be solved. It should prove useful to those for whom it is intended and they, presumably, are unlikely to boggle at a price which certainly seems high. Much of the information and guidance that it gives cannot readily be found elsewhere.

It is written clearly but in a style which invites pruning and is at times involved and pompous ("If that is the opinion of such an august authority, it would be presumptuous to endeavour more than to indicate the dangers of that section; but here let it be said that the Estate Duty Office rarely ever invokes this section unless there is a blatant case of duty avoidance"—p. 134). In Chapter 6, dealing with Ordinary Shares, one might have expected some reference to the views of the institutional investors on non-voting A Shares. In the final paragraph on p. 146 there is a somewhat loose use of the expression "par."

However, the author knows his stuff and he has rendered a useful service in passing it on. As Lord Piercy says in a felicitous Foreword "much wisdom is to be found thoughout the work—the fruit, as Bagehot would have said, of an experiencing mind."

L. C. B. G.

The Taxation of Gifts and Settlements: Including Pension Provisions by Stamp Duty, Estate Duty, Income Tax and Surtax. By G. S. A. Wheatcroft, J.P., M.A. (Oxon.), assisted by Michael Franks, M.A.(Oxon.). Third ed. [London: Sir Isaac Pitman & Sons, Ltd. 1958. 249 pp. £2 12s.]

Surely there can be no branch of the law of England or Scotland today which does not require, for its practical application, some knowledge of taxation. This does not mean that every lawyer must be an expert in tax; but that he must have a sufficient grasp of the subject to be able to perceive a point of tax law which would otherwise escape his attention. And since the branch of the law which is most closely connected with tax is probably that which has to do with gifts and settlements, the taxation of gifts and settlements is a subject of which no lawyer who deals with trusts of any sort can afford to be ignorant.

The Taxation of Gifts and Settlements is divided into two parts of roughly equal length. The first part contains a short statement of the law relating

to stamp duty, estate duty, income tax and surtax. The reader who comes to the subject for the first time would probably find this as good an introduction to the law as can be found anywhere, as although it is written with an eye on gifts and settlements, it manages to cover the whole subject in a manner both accurate and readable. The second part deals with the impact of tax law on gifts and settlements. The use of the terms "gifts and settlements" is a little misleading, since the book also deals with seven year covenants, insurance policies and retirement pensions: its scope is in fact rather wider than its title suggests. Taking the two parts together, it is safe to assert that there is to be found in this book every point of revenue law which a practitioner ought to bear in mind when he advises on a gift or settlement: and it is all set out concisely, without superfluous verbiage.

The book is thus one to be recommended. Over four years have passed since the second edition was published, and the extensive changes in the law which have occurred during that time make it essential for the practitioner, if he is to use the book at all, to use the new edition. And for the practitioner who has anything to do with gifts, wills, trusts or settlements, and whether he thinks he knows about tax or not, this book is indispensable.

D. C. Potter.

Purchase Tax. By A. T. Grieve, m.a., ll.b.(Cantab.), Solicitor of the Supreme Court. [London: Sweet & Maxwell, Ltd. 1958. 208 pp. 25s. net.]

In sixty-four pages this book explains the whole law of purchase tax: the Appendices give the relevant statutes and a number of official notices including the General Guide to Purchase Tax Procedure. It thus provides a complete survey of the tax, and should be useful as a reference book. In addition, it provides a pleasantly compact explanation for the person who wishes, for whatever reason, to acquire a knowledge of the tax rapidly. It should perhaps be noticed that the reader will also require a copy of the First Schedule to the Finance Act, 1958, which contains the new rates which came into effect on April 16, 1958, and a copy of Notice No. 78, the Schedule of Goods Charged with Purchase Tax, if he intends to apply his knowledge in practice. If he objects that this means the book is not complete in itself, the answer is that the Schedule and the Notice are both fairly long, and can be obtained from the Stationery Office: to have included them would have made the book too long.

The legal profession rarely deal with purchase tax, but any practitioner who finds himself obliged to do so should join those who will surely find this book of constant usefulness, the manufacturers, retailers, importers and others, who are obliged to pay the tax irrespective of their profits. The subject is not exactly interesting to those not concerned in paying or collecting the tax: but occasionally it gives the imagination something to do: to wonder, for example, how the Commissioners of Customs and Excise came to fix the dimensions which differentiate a "lady's front or modesty vest" from a "blousette."

D. C. P.

The Elements of Drafting. By E. L. Piesse, A Solicitor of the Supreme Court of Victoria, and J. Gilchrist Smith, ll.d., A Solicitor of the Supreme Court. Second edition. [London: Stevens & Sons, Ltd. 1958. xv and 115 and (Index) 4 pp. 12s. 6d. net.]

This small book first appeared in this country in 1950. Its popularity is shown by the fact that between then and the present edition a reprint was

needed and was exhausted. In its revised form that popularity should continue. The present edition is slightly larger than the old. New references have been added, and the first chapter, in particular, has been expanded, but the general character remains. One merit of the book is the considerable use made of the work of older masters of draftsmanship, such as Lord Thring. That remark is not intended to be derogatory of the work of the authors, but often the works to which they refer are hard to find nowadays, and a service is done in making essential parts readily available. The authors' own part is well done. Although the title to the book is a challenge to the reader to find ambiguities in the text, it is hard to find occasions when one would quarrel with either the advice or the method of expressing it; in the next edition, though, the references to Scottish cases should be made to conform to Scottish conventions. The book remains a valuable and readable guide to accurate expression, and every law apprentice ought to be able to afford, what is today, its modest price; reading the book will repay him.

J. D. B. Mitchell.

The Law and Practice of Meetings. Fourth edition. By Frank Shackleton, f.c.i.s. [London: Sweet & Maxwell, Ltd. 1958. xxiv and 280 and (Appendices) 8 and (Index) 8 pp. 30s. net.]

Twenty-four years have passed since *Shackleton on Meetings* made its first appearance. It was well received then, it has earned a high place in the meanwhile and this fourth edition retains the same high standard.

There have been few changes in the law of meetings since the last edition, but the opportunity has been taken to incorporate recent decisions, to refer to the Defamation Act, 1952, and to effect such minor re-arrangements of the text as experience has suggested. This book continues to be one which may safely be commended to anyone concerned with the proper conduct of a meeting.

Allister Lonsdale.

Yearbook on Human Rights for 1955. United Nations. [New York: United Nations; London: H.M.S.O. 1958. xvi and 431 pp. 32s. net.]

The tenth volume of the *Yearbook on Human Rights*, which has been compiled on the basis of the Universal Declaration of Human Rights, contains reports on the situation in seventy-eight States, including Liechtenstein—industrial and building workers are to receive in future, regardless of nationality, a holiday allowance of four per cent. of their wages, payable by way of voucher; Monaco—the Principality acceded to the Convention on Safety of Life at Sea and ratified the Universal Copyright Convention, and also introduced legislation for the protection of patents, copyright and trade marks, and for the arbitration of industrial disputes; San Marino—for the establishment of a compulsory system of social security; and Saudi Arabia—"Islamic law, derived from the Koran, is a safeguard for all human rights. The law of Saudi Arabia emanates from Islamic jurisprudence, insofar as all personal civil relations in the community are concerned. Islamic law is so flexible that it does guarantee, in the kingdom, human rights in conformity with the United Nations Universal Declaration of Human Rights." On this there is an editorial note: "Information received from the Government of Saudi Arabia." If Mr. Greenidge's recent book on *Slavery* is to be believed, the Government of Saudi Arabia is apparently unaware that slavery is forbidden by the Declaration.

From the point of view of English readers the most interesting entry is that from the United Kingdom Delegation to the United Nations. As regards legislation, this mentions that the Children and Young Persons (Harmful Publications) Act, 1955, "prohibits the dissemination of certain kinds of pictorial publications harmful to children and young persons," while the Aliens' Employment Act, 1955, "allows aliens in certain circumstances to be employed in civil service under the Crown." Apart from this mention of the two statutes, there is a twenty-four-line summary of *Watt* v. *Kesteven County Council* [1955] 1 All E.R. 473. Of the more important decision, from the point of view of the protection of human rights, in *Ex p. Kolczynski* [1955] 1 Q.B. 540, the delegation saw fit to state merely that this "was a decision of the divisional court on a question of the interpretation of the provision of section 3 (1) of the Extradition Act, 1870, which prohibits the surrender of a fugitive criminal if the offence is of a political character, or if the requisition for surrender has been made with a view to his trial or punishment for an offence of a political character." The fundamental point of the decision, which redefined the concept of a political offender, moving from the nature of the offence as laid down in *Re Castioni* [1891] 1 Q.B. 149, to the nature of the offender, is not even hinted at.

The entire entry on the United Kingdom takes less than half a page. It is submitted than an entry of this character tells the reader little or nothing of the situation in Great Britain. Further it does the country an injustice. Those responsible for its compilation would do well to study the ten-page entry from the United States. This is divided into an Introduction; Human rights in general—Human Rights Day (in the United Kingdom the tenth anniversary of the Declaration on December 10 was almost completely ignored both by the Government and the B.B.C.); Civil and political rights—life, liberty and security of person, equal protection of the law, freedom of speech and the press, freedom of religion, freedom of travel, fair trial and government by the will of the people; Economic, social and cultural matters—work and remuneration, social security, housing, vocational rehabilitation, health, education, and benefits of scientific advancement. It is true that the federal character of the United States and the struggle against racial prejudice give greater scope for developments where human rights are concerned. Nevertheless, sufficient happens in this field annually in the United Kingdom to allow of a report on somewhat similar lines.

In addition to the information furnished by States about their municipal developments, there are reports on the position in trust and non-self-governing territories, although there is nothing from the United States on her strategic trust territory in the Pacific. A further section is devoted to international instruments, while the final part of the volume deals with the United Nations and human rights, including a summary of the comments of the World Court on nationality and naturalisation in the *Nottebohm* case.

Even though it might be considered as wishing for the moon, one cannot help expressing the desire that the Human Rights Division of the Secretariat would compile its own reports on what has happened in individual States. It is as important to know when human rights are denied as when they are respected.

L. C. Green.

International Tax Agreements. Vol. VII. United Nations Department of Economic and Social Affairs. [New York: United Nations; London: H.M.S.O. 1958. x and 384 pp. 18s. net.]

Volume VII of the *International Tax Agreements* published by the United Nations is the last of the present series, which commenced in 1948, to be published in the present form. Volume VIII will be a tabulated *World Guide*

to International Tax Agreements dealing with the agreements that have been entered into until June 1, 1955. Volume IX will institute a new method of publishing these agreements. It will be a ring binder containing new texts with quarterly supplements, while Volume X will provide the same service for the *Guide,* although in this case supplements will be published annually. By publishing *International Tax Agreements* as a current series in future, the United Nations will prevent a recurrence of the situation whereby the latest document included in Volume VII and published in 1958 was signed in July, 1957, while it may be possible in future to know the state of ratifications at any particular date.

The present volume contains thirty-eight agreements on income and property taxes, of which one is between the Isle of Man and the United Kingdom and another between Guernsey and Jersey—which may be considered international agreements only by an extensive interpretation of the term. There is one agreement dated 1956 on the taxation of income from movable capital which may have to be revised at an early date for it has been entered into by France and the Government-General of French West Africa. As regards the taxation of income from non-residents there are three letters between the Canton of St. Gall (Switzerland) and Liechtenstein, dated 1926, confirming that frontier workers are immune from tax. There is one agreement on the taxation of income from air transport enterprises and nine, to no less than four of which Israel is a party, on the taxation of income from maritime and air transport enterprises.

There are two bilateral and three multilateral agreements on the taxation of motor-vehicle traffic. The latter deal with private vehicles in international traffic, international goods transport and international passenger transport, and were all signed at Geneva in 1956.

This volume of *International Tax Agreements* includes ten agreements on death duties and gift taxes contracted between 1954 and 1957, including that of 1956 between the United Kingdom and India and of 1957 between the United Kingdom and Pakistan. According to these "India" means "all the States and territories comprised in the Union of India" and "Pakistan" means "the Provinces of Pakistan and the Capital of the Federation." Neither indicates what happens with regard to death duties on property in Kashmir, nor whether both Republics are equally entitled to claim with regard to Junagadh.

The remaining five agreements concern reciprocal administrative assistance (2) and sales, transfer and turnover taxes (3).

It is of interest to note that the present volume contains only three agreements concerning countries of Eastern Europe. Hungary is a party to all three, each of which relates to income and property taxes. Two are pre-war, while the third was entered into in 1948 with Roumania, perhaps one of the last agreements concerning income tax and death duties to be entered into by a Communist State.

L. C. Green.

Tasmanian University Law Review. Vol. 1, No. 1. July 1958.

Journal of the Indian Law Institute. Vol. 1, No. 1. October 1958.

We extend a hearty welcome to these new periodicals, the appearance of which at a short interval made 1958 a remarkable year in the legal history of the Commonwealth, for both are of outstanding quality, which their respective editors will not find it easy to maintain.

The small go-ahead Law School at Hobart under its chief of the Law Department and General Editor of this *Review,* Professor R. W. Baker, has relied mainly upon outside assistance for the articles in its first number.

The wisdom and urbanity of Sir Garfield Barwick, whom one is glad to congratulate on promotion since this number appeared, provides the keynote to his "Courts, Lawyers, and the Attainment of Justice." His shrewd, practical commentary on the difficulties which are interfering with the smooth administration of justice in Australia, so similar to those being experienced here, will be of interest to common lawyers everywhere.

The most scholarly article in this number is "Thomas Hobbes and the Common Law" by Miss Enid Campbell, a young Tasmanian lawyer at present working in the U.S.A. Holdsworth long ago drew attention to Hobbes' trenchant criticisms of the common law as administered in his day—and it was one of its "strongest" periods. It is good to have this detailed and well-documented exposition of Hobbes' views.

Two substantial articles on South East Asian problems, the "Emergence of a New Federation in Malaya" by Professor Zelman Cowen and "Human Rights and the Criminal Law in South East Asia" by Professor Norval Morris, underline the new-found community of interest between Australia and that area of the world. Students of constitutional law will benefit from the wide perspective which Professor Cowen brings to his work, while all progressive and liberty-loving lawyers will be encouraged by the sympathetic and go-ahead outlook which marked the discussions at the first United Nations regional conference on the protection of human rights in criminal law, which was held at Manila in February, 1958.

In a "Plea for Restitution" Mr. R. P. Roulston, a member of the Editorial Committee of the *Review*, brings together and summarises much of the material which has been appearing on unjust enrichment during the past generation and makes an eloquent plea for accepting Restitution as a main category of the common law. In a survey of the law relating to sexual offences, perforce somewhat superficial owing to its shortness, the Solicitor-General of Tasmania, Mr. D. M. Chambers, Q.C., devotes much of his space to interesting and promising new types of treatment for this type of offender introduced there as recently as 1956. In such cases, on the application of the prosecution, the court may make either a segregation order or a treatment order. The segregation order is of particular interest because without being a sentence of imprisonment it enables the offender's liberty of movement to be substantially restricted, and while it can in the first place only be made for a period of twelve months it can apparently be extended in proper cases. This as Mr. Chambers points out offends against English prejudices in respect of indeterminate sentencing. However, this does not seem to me to be an essential element in the treatment which is concerned with control falling short of imprisonment, a method which I have long felt should be introduced in England if we are ever to make real headway in the Herculean task of preventing deliquency.

It is interesting to note in this number a certain orientation towards the U.S.A. on the part of the Tasmanian Law School: thus the Editors turn to a distinguished American judge, Justice Frankfurter, for a foreword. On the other hand most of the Case Notes and many of the Book Reviews deal with English cases and books. This duality of influence cannot but be of value.

The Indian Law Institute is a recent foundation, and it speaks volumes for the importance attached by the highest authorities in that country to scientific study of the law that the opening ceremony held at Parliament House, New Delhi, in December, 1957, was attended by the President of the Republic, who is its Patron in Chief, by the Vice-President and the Prime Minister, who are its Patrons, and by the Chief Justice of India, who is its President. On this occasion most of these gentlemen made speeches which are reproduced in this first number of the Institute's *Journal*, and which, if one may be permitted to say so, are models of their kind.

After the inaugural ceremony the Institute proceeded immediately to hold

a Seminar on Administrative Law, which was organised with the help of two eminent American lawyers, Professors Ebb and Clark Byse, and received the financial support of the Ford Foundation. It is understandable that the Indians, who have adopted a federal constitution, should feel that they have much to learn from American experience. Yet it is clear enough from the articles contributed to this number that the prevailing authorities, apart from their own growing and valuable case law, are still British. One noteworthy point is that having looked with interest and perhaps with hope at the French administrative law arrangements the Indians have definitely concluded that the common law suits their requirements better.

It was a useful, if perhaps a bold, decision to devote the first number of the Institute's *Journal* to the publication of the texts contributed to the Seminar on Administrative Law to which I have just referred. A number of exceptionally gifted lawyers, many of them holding high judicial office in India, had taken part in the discussions, and it was important that their contributions should be made available to a far wider audience than the Seminar to whom they were addressed.

While a few of these addresses are concerned with the peculiar problems of India herself, for the most part they deal with the wide general matters which are so vital to us all. It is naturally not possible here to comment upon all these articles, but a few of the titles together with the names of the contributors will be sufficient to indicate their interest and importance. Thus we have the "Rule of Law and a Planned Society" by S. V. Ramaswami, Chief Justice of the Patna High Court; "Administrative Law—Essential Elements" by P. B. Mukharji, Judge of the High Court, Calcutta; "Judicial Review of Administrative Proceedings" by Shri M. C. Setalvad, Attorney-General of India; and "Control of the Legislative Powers of Administration" by Shri N. C. Chatterjee, Senior Advocate of the Supreme Court of India.

In his persuasive foreword, Chief Justice Shri S. R. Das, President of the Institute, makes it clear that this *Journal* will be devoted principally to "transmission of the research activities of the Institute," and these will be largely concerned with the legal aspects of the social life of a community which has dedicated itself to achieving the Welfare State. Dr. K. M. Munshi, Chairman of the Executive Committee of the Institute and also of the Editorial Board, expands this interestingly in an editorial foreword. He also contributes a valuable report of the Seminar on research topics in which he analyses the results which emerged from the Seminar.

G.

THE LEGAL HISTORIAN. No. 1, 1958. [Published annually for the American Society for Legal History by the Bobbs-Merrill Co. Inc. 1958.]

READERS will welcome the appearance of this little book which recounts the foundation of the American Society for Legal History in December, 1956, and constitutes in the main that Society's annual account of its activities, the principal one being the *American Journal of Legal History* which began to appear in February, 1957; "the quarterly subscription rate of the *Journal* is $7.50, but members of the Society receive it without charge"—an unhappy phrase, which wrongly suggests that the *Journal* costs thirty dollars a year. For "quarterly" we should most probably read "annual." This brochure contains a statement of aims, "an alphabetical list with biographical matter" concerning the members, a bibliography of members' publications (which duplicates, it seems, material which is already contained a few pages earlier in the alphabetical list), a "registry of projects in legal history" and a selection from the Hampton L. Carson Collection of letters of justices of the United States Supreme Court.

The president and the secretary of the Society, and the editor of the *Journal*, can be reached at the Temple University School of Law, 1715 North Broad Street, Philadelphia 22, Pa.

T. F. T. P.

Principles of South African Company Law. By the late E. Emmett and T. B. Barlow. Fourth edition by T. B. Barlow, B.A.(S.A.), LL.B. (Cape Town), LL.D. (Stellenbosch), Advocate of the Supreme Court of South Africa, and M. D. Emmett, B.A., LL.B. (Cape Town), Attorney of the Supreme Court of South Africa. [South Africa: Cape Town and Johannesburg: Juta & Co., Ltd. London Agents: Sweet & Maxwell, Ltd. 1957. xxx and 364 pp. 54s. 6d. net.]

This is the fourth edition of a well-known and succinct work on Company Law, much used by students and often consulted by practitioners. It is good to see a younger Emmett maintaining the high standard set by the late Professor Emmett. The present edition contains two new or resuscitated chapters, one on the criminal liability of a company, its directors and servants, the other on criminal offences under the Companies Act generally. These chapters are particularly interesting. The liability placed by section 381 of the Criminal Procedure Act on a company for the acts and omissions of its directors and servants performed in the exercise of their powers or the performance of their duties as servants is very wide. It is not limited to crimes of strict liability or to highly placed servants: and even if the director or servant is not acting in the performance of his duties, the company is criminally liable if he was endeavouring to further the interests of the corporate body. It can only be justified as a measure to prevent the members of a corporation from being unjustly enriched through the activities of its directors or servants: and perhaps the criminal law is the best or only means of securing this end.

Emmett and Barlow, like *Charlesworth* in English law, is outstanding as a short but never superficial account of the subject.

A. M. Honoré.

Best Murder Cases. Edited by Donn Russell. [London: Faber and Faber. 1958. 272 pp. 18s. net.]

Among my earliest undergraduate reminiscences of the criminal law is a sort of quip about "irresistible" or "uncontrollable" impulse which has found its place in dozens of textbooks. The criminal, so we were told on the authority of some judge whose name escapes me, would certainly resist the impulse if a policeman were at his elbow.

I never cared for this facile generalisation, but I owe to Mr. Donn Russell my first acquaintance with a case that proves it downright wrong. One of the stories in his admirable anthology *Best Murder Cases* concerns the shooting by a policeman of a man with another policeman standing beside him, and the success of a brilliant American trial lawyer, Samuel S. Leibowitz, in saving him from a death sentence by the plea of uncontrollable impulse, less than twenty years ago. This is my favourite among the thirteen cases collected in this volume from various countries and periods, but it is run close by Raymond Postgate's account of Charles Peace who led a Jekyll-and-Hyde existence for almost two years in the 1870s and, incidentally, confessed to a murder for which a poor Irishman had been sentenced to death in an English court and nearly sent to the gallows.

Best Murder Cases contains examples of the most spectacular performances in the criminal courts of Marshall Hall, Lord Birkenhead, Sir Patrick Hastings,

and some of the most popular writers on the subject like Edgar Lustgarten, Quentin Reynolds, and Richard Roviere. It is a pity that the editor himself, who is so good a judge of the well-told murder case, should have indulged in "fine writing" in his introductory remarks to what he calls with affectation "*the good tellings* in English of murder trials."

H. A. HAMMELMANN.

Books and Publications Received

REPORTS OF RESTRICTIVE PRACTICES CASES. Editor: R. P. COLINVAUX. Vol. I, Part 1, October, 1958; Part 2, November, 1958. [The Incorporated Council of Law Reporting for England and Wales, London. Subscription £8 8s. 0d. a volume.]

A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS. Vol. 6. Australia, New Zealand and their Dependencies. Second edition. [London: Sweet & Maxwell, Ltd. 1958. vii and 147 pp. 30s.]

CIVIL LIBERTIES DOCKET. Vol. III, Nos. 3 and 4, April and July, 1958. [National Lawyers' Guild, 154 Nassau St., New York City 38, N.Y. Ann. subscription $7.50.]

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. VIII, Nos. 2 and 3, 1958. [Basil Blackwell, Oxford. Ann. subscription 42s.]

GEGENOPFER UND OPFERVERWEHRUNG. Strukturen des Schuldrechts auf der Grundlage des anglo-amerikanischen "check-and-balance"-Systems. By DR. WALTER G. BECKER. [Franz Vahlen G.m.b.H. Berlin. 1958. 516 pp. DM. 45.]

THE MORAL DECISION. RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW. By EDMOND CAHN. (First published in 1955 by the Indiana University Press.) [London: Stevens & Sons, Ltd. 1959. ix and 316 pp. 25s.]

MELBOURNE UNIVERSITY LAW REVIEW. Formerly RES JUDICATAE. Vol. I, Nos. 1–4 (July, 1957–November, 1958). [Distributors: The Law Book Co. of Australasia Pty. Ltd.]

HANSON'S DEATH DUTIES. Tenth edition. Third Cumulative Supplement to January 1, 1959. By H. E. SMITH, assisted by P. H. FLETCHER. [London: Sweet & Maxwell, Ltd. 1959. xi and 140 pp. £1 1s. post paid.]

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Laws and Regulations on the Regime of the High Seas. (Vols. 1 and 2) and Laws Concerning the Nationality of Ships. [United Nations: New York. 1959. xxi and 134 pp. 9s.]

The Irish Election System. What it is and how it works. By J. F. S. Ross. [London: The Pall Mall Press, Ltd. 1959. x and 85 pp. 3s. 6d.]

Richter, Staat und Gesellschaft in England. By E. J. Cohn. Juristische Studiengesellschaft, Karlsruhe. Schriftenreihe Heft 37/38. [C. F. Müller. Karlsruhe. 1958. 52 pp. DM. 3,60.]

Encyclopaedia of Planning, Compulsory Purchase and Compensation. Vol. 1, Revision 33, November 21, 1958. Vol. 2, Revision 33, November 21, 1958. Vol. 1, Revision 34, Vol. 2, Revision 34, February 2, 1959.

Green's Death Duties. Supplement to fourth edition. By D. J. Lawday and E. J. Mann. [London: Butterworth & Co. (Publishers), Ltd. 1958. 7s. 6d., postage 6d.]

Current Law Year Book, 1958. With Cumulative Index to All the Law for 1947–1958. [London: Sweet & Maxwell, Ltd. Current Law Citator, 1947–1958. Two volumes. £4 10s. net.]

The Constitution and Powers of Parish Councils and Parish Meetings. By Charles Arnold-Baker. With a Preface by the Rt. Hon. Henry Brooke. Second edition. [The National Association of Parish Councils, 26, Bedford Square, London, W.C.1. 1959. viii and 40 pp. 2s.]

Memoranda of Evidence Submitted to the Select Committee of the House of Commons on Obscene Publications by the Progressive League. [Alec Craig, The Society of Labour Lawyers. The Progressive League, 20, Buckingham Street, W.C.1. 1958. 12 pp. 2s.]

Clerk & Lindsell on Torts. Fifth Cumulative Supplement to the Eleventh edition. (To September 1, 1959.) By F. Maurice Drake, m.a. [London: Sweet & Maxwell, Ltd. 7s. 6d.]

Charlesworth on Negligence. Third Cumulative Supplement to the Third edition. (To September 1, 1959.) By R. A. Percy, m.a. [London: Sweet & Maxwell, Ltd. 7s. 6d.]

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